

## Taking State Constitution Seriously

Marvin Krislov

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# TAKING STATE CONSTITUTIONS SERIOUSLY

*Marvin Krislov and Daniel M. Katz\**

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## INTRODUCTION

That useful alterations will be suggested by experience, could not but be foreseen. It was requisite, therefore, that a mode for introducing them should be provided. The mode preferred by the convention seems to be stamped with every mark of propriety. *It guards equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults.*<sup>1</sup>

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<sup>1</sup> THE FEDERALIST No. 43, at 275 (James Madison) (Clinton Rossiter ed., 1961) (emphasis added).

To remain vital, a political institution should adapt to emerging circumstances while avoiding changes that are likely to be anachronistic.<sup>2</sup> Framers such as James Madison understood this tension and built a degree of semi-permanence into the American political system.<sup>3</sup> A review of the amendment procedures contained in Article V demonstrates the laboriousness of modifying the United States Constitution.<sup>4</sup> Specifically, Article V provides no direct method for citizen involvement in the amendment process and instead requires a two-thirds vote of both houses of Congress<sup>5</sup> in addition to ratification by three-quarters of state legislatures.<sup>6</sup>

The framers of many American state constitutions also worried about questions of institutional robustness.<sup>7</sup> At the same time, concern

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<sup>2</sup> A host of public-choice scholars, most notably 1986 Nobelist James M. Buchanan, Jr., devote substantial attention to questions of constitutional choice and change. See, e.g., James M. Buchanan, *The Domain of Constitutional Economics*, 1 CONST. POL. ECON. 1, 1–2 (1990) (describing how the constitutional political economy research program focuses on how individuals and groups impose constraints upon future actions while still allowing those constraints to adapt); JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* 3–4 (1962) (analyzing constitutional economics as a study of choice among various constraints). Randall G. Holcombe, a disciple of Buchanan, describes the enterprise quite precisely: “An ideal constitution would constrain the government to prevent it from engaging in inefficient activities, but would not be so constraining as to prevent it from pursuing efficient activities. The concept is clear in theory, but is one of the practical challenges of constitutional design.” Randall G. Holcombe, *Constitutions as Constraints: A Case Study of Three American Constitutions*, 2 CONST. POL. ECON. 303, 326 (1991). Literature in a variety of academic fields focuses on examining the nature of as well as the conditions producing institutional change. See, e.g., James G. March, *Exploration and Exploitation in Organizational Learning*, 2 ORG. SCI. 71, 71–72 (1991) (asserting that organizations must find a balance between searching for new and innovative practices and exploiting and manipulating the best existing practices of an organization). The work of 1993 Nobelist Douglass C. North also addresses the relationship between institutional change and economic performance. See, e.g., DOUGLASS C. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE* 3 (1990).

<sup>3</sup> See, e.g., U.S. CONST. art. V.

<sup>4</sup> See U.S. CONST. art. V. Political Scientist Donald Lutz characterizes the U.S. Constitution as one of the most difficult constitutions in the world to amend. See Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 237, 265 (Sanford Levinson ed., 1995). Although the U.S. Constitution also provides for the possibility of a constitutional convention, this process has never been undertaken at any point over the past two centuries. Professor Levinson has consistently called for consideration of a constitutional convention to remedy the document’s structural deficiencies. For a recent discussion on the subject, see Sanford Levinson, *The Democratic Deficit in America*, 1 HARV. L. & POL’Y REV. (Online) (Dec. 4, 2006), [http://www.hlprronline.com/2006/11/levinson\\_01.html](http://www.hlprronline.com/2006/11/levinson_01.html).

<sup>5</sup> U.S. CONST. art. V. See *National Prohibition Cases*, 253 U.S. 350, 386 (1920) (reasoning that two-thirds of the house members present, not two-thirds of overall membership, was necessary to propose a constitutional amendment).

<sup>6</sup> U.S. CONST. art. V.

<sup>7</sup> JOHN J. DINAN, *THE AMERICAN STATE CONSTITUTIONAL TRADITION* 29–63 (2006). Professor Dinan’s book provides a very rich account of the debates over amendment and revision procedures during the framing of both the U.S. Constitution and state constitutions. For

about the unknown and a general distrust of institutional permanence led a number of state constitutional framers to argue for a relatively unrestrictive amendment process.<sup>8</sup> As a result of such efforts, American state constitutions generally feature less restrictive amendment processes than is present at the federal level.<sup>9</sup> Many states provide multiple avenues to constitutional change and permit extensive citizen involvement in the constitutional amendment process.<sup>10</sup> In virtually every state, it is not even possible to amend or revise a constitution without first submitting it to the public for electoral consent.<sup>11</sup>

States vary widely in their amendment processes.<sup>12</sup> This lack of uniformity suggests that at least some states could improve their political institutions by converging upon the practices of neighboring jurisdictions. This article proceeds with an eye toward Madison's goal of optimizing the method of institutional modification<sup>13</sup> by considering the process of American state constitutional change—a process increasingly dominated by the most “direct” forms of direct democracy.<sup>14</sup>

Part I of this article briefly describes both the theoretical and historical origins of American direct democracy. It then completely categorizes the set of processes that together comprise the domain of direct democratic lawmaking vehicles. These vehicles include both “direct” and “indirect” methods as well as mechanisms that provide for the modification

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example, consider William Meredith, a Pennsylvania state legislator who argued in favor of a restrictive amendment process: “Change in the fundamental law ought not to be made on trivial or light grounds. And while the right was renewed to the people to alter their constitution, the attainment of that object ought not to be rendered too easy, and accomplishable by mere party cries.” *Id.* at 40 (quoting 12 PROCEEDINGS AND DEBATES OF THE CONVENTION OF THE COMMONWEALTH OF PENNSYLVANIA 236–37 (1837)).

<sup>8</sup> See *id.* Professor Dinan carefully documents how a variety of state constitutional convention participants supported their respective positions on constitutional revision and amendment processes. For example, he quotes William Steele, a member of the Indiana Constitutional Convention who noted:

[S]hall we say that we have arrived at the farthest point in the progress of improvement—that no further advance can be made—that we have attained perfection—that there will hereafter be no necessity for alteration—that we are to remain stationary and seek no further advance in the science of government?

*Id.* at 35 (quoting REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA (1850)).

<sup>9</sup> *Id.* at 29.

<sup>10</sup> See Figure 1.1 *infra* Part I.

<sup>11</sup> For a brief but clear mention of Delaware's unique status, see Gerald Benjamin, *Constitutional Amendment and Revision*, in 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY 177, 185 (G. Alan Tarr & Robert F. Williams eds., 2006) (noting “[I]n Delaware no popular ratification is required to amend the state constitution.”).

<sup>12</sup> See *infra* Parts I, II.

<sup>13</sup> See THE FEDERALIST NO. 43, *supra* note 1, at 275.

<sup>14</sup> As described in Part I *infra*, the term “direct democracy” casts a broad definitional net and encompasses any process that calls for citizen involvement. The most “direct” forms of direct democracy are the Direct Constitutional and Direct Statutory Initiatives because these processes provide no role for legislative or executive actors.

of both statutory and constitutional law. Further, this Part uses these classifications to describe current trends in citizen-involved lawmaking.

Prior research demonstrates an overall increase in the use of direct democratic processes. This article, however, breaks new ground by using nearly three decades of empirical data collected specifically for use in this analysis.<sup>15</sup> These data indicate that the Direct Constitutional Initiative (DCI) is driving this increase within jurisdictions that feature this lawmaking process. In other words, at least within the sixteen DCI states, the direct-democracy phenomenon should be best understood as constitutional in nature.<sup>16</sup>

Part II of the article reviews institutional rules of the relevant jurisdictions through a comparative analysis of the requirements for the proposal and ratification of direct constitutional and statutory changes. It concludes that the institutional rules displayed in DCI jurisdictions incentivize individuals and groups to select this approach when seeking a substantive policy change.

Part III evaluates the increased use of the Direct Constitutional Initiative through a comprehensive review of the legal literature that considers judicial review of direct democracy. This literature suggests that judicial officials may be unwilling or unable to police direct democracy, and, in particular, constitutional direct democracy. Drawing upon a host of interdisciplinary scholarship, Part III then presents critiques of not only constitutional change<sup>17</sup> but also of plebiscite lawmaking.

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<sup>15</sup> Data for the article are the results of direct democratic processes collected from a variety of sources and reflect a complete collection of all statewide measures in each of the fifty American states from 1977 to 2006. As presented herein, our data display the total number of measures of each type that reached the ballot. We tallied the passage rate for the respective periods among those that made it to the ballot. Our collection process included the search and crosscheck of data from the National Conference of State Legislatures' ballot measures database and the University of Southern California Initiative and Referendum Institute. To collect any missing data, as well as to audit our data, we contacted the secretaries of state of the applicable states, as well as other local sources. Thank you to all individuals who assisted us in the data-collection effort.

<sup>16</sup> In his classic book reviewing the period from 1950–1980, David Magelby noted the increased appeal and success of statutory processes. See DAVID B. MAGELBY, *DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES* 72 (1984). However, as a follow up to Magelby's work, the data collected for this article are used to analyze the thirty-year period from 1977 to 2006. It is worth noting that only a few scholars emphasize the increasing constitutional nature of direct democracy. While not exclusively focused on the exact period of our inquiry, consider Professor G. Alan Tarr, one of the world's foremost experts on sub-national constitutions, who notes: "From 1950 to 1974, states adopted only 279 initiatives, but in the succeeding twenty-five years they adopted 929." See G. Alan Tarr, *For the People: Direct Democracy in the State Constitutional Tradition*, in *DEMOCRACY: HOW DIRECT?: VIEWS FROM THE FOUNDING ERA AND THE POLLING ERA* 87, 87 (Elliott Abrams ed., 2002).

<sup>17</sup> As an example of the broader point, consider the view of Fourth Circuit Judge J. Harvey Wilkinson III. Discussing proposed federal and state constitutional amendments purporting to ban gay marriage, he notes, "[O]rdinary legislation—not constitutional amend-

This article does not directly consider substantive outputs of constitutional direct democracy. Instead, it focuses upon a set of procedural elements that would, at a minimum, help the DCI embrace robustly supported proposals. To do this, it surveys the nation for a set of best direct democratic practices that together may yield an optimal method of constitutional modification. While the Conclusion ultimately rejects complete convergence<sup>18</sup> by all jurisdictions, it does support a process that takes state constitutions seriously and treats them as the supreme level of American state law.

## I. CONSTITUTIONAL DIRECT DEMOCRACY IN AMERICA: THE CURRENT STATE OF AFFAIRS

### A. CLASSIFYING THE DOMAIN OF AMERICAN DIRECT DEMOCRACY

The historical origin of direct democracy in America is inextricably tied to the political reform movements of the Progressive Era.<sup>19</sup> Driven by the perception the political marketplace was captured by powerful entrenched interests, progressives working in the early twentieth century sought mechanisms to combat both legislative capture and the shirking of politicians.<sup>20</sup> Progressives advocated adopting provisions that allowed

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ments—should express the community's view . . . the more passionate an issue, the less justification there often is for constitutionalizing it." He concludes with a simple statement: "Leave constitutions alone." J. Harvie Wilkinson, *Hands Off Constitutions; This Isn't the Way to Ban Same-Sex Marriage*, WASH. POST, Sept. 5, 2006, at A19; see also J. Harvie Wilkinson, *Gay Rights and American Constitutionalism: What's a Constitution For?*, 56 DUKE L.J. 545 (2006).

<sup>18</sup> Building upon the work of Jenna Bednar, Part IV *infra* supports an "optimal level of convergence" such that search and the benefits of convergence as jointly maximized. For an extended discussion see JENNA BEDNAR, *THE ROBUST FEDERATION* (forthcoming 2008).

<sup>19</sup> See THOMAS CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM AND RECALL* 8 (1989); STEVEN PIOTT, *GIVING VOTERS A CHOICE: THE ORIGINS OF THE INITIATIVE AND REFERENDUM IN AMERICA* 1–15 (2003); G. ALAN TARR, *UNDERSTANDING STATE CONSTITUTIONS* 150–53 (2000); Patrick L. Baude, *A Comment on the Evolution of Direct Democracy in Western State Constitutions*, 28 N.M. L. Rev. 343 (1998); Richard Collins & Dale Oesterle, *Structuring the Ballot Initiative: Procedures that Do and Don't Work*, 66 Colo. L. Rev. 47, 54 (1995) ("[M]ost states that allow the initiative adopted it during the Progressive Era. Beginning with South Dakota, nineteen states authorized state-wide initiatives between 1898 and 1918.").

<sup>20</sup> The principal-agent relationship is the mechanism organizations typically employ to delegate responsibility to individuals charged to exercise decisional authority on its behalf. The drive for institutional optimization through delegation, however, must be tempered by a downside risk of suboptimal agent behavior. Namely, delegation and reliance upon agents create the conditions for "shirking" whereby agents advance their own goals rather than the policy preferences of the principals they serve. While the electoral marketplace is designed to oversee political agents, the efficacy of oversight in the political marketplace, however, is far from clear. See, e.g., JOHN MATSUSAKA, *FOR THE MANY OR THE FEW* (2004); see also James A. Gardner, *Voting and Elections*, in 3 *STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY* 145, 169 (G. Alan Tarr & Robert Williams eds., 2006) ("Reformers have generally claimed only that representative democracy periodically becomes perverted by legislative incompetence or corruption, and that direct democracy provides a needed corrective.").

citizens to modify statutory or constitutional law.<sup>21</sup> Thus, many state constitutions amended or adopted during this era provide for a variety of forms of direct democracy, with a large number of these specific mechanisms for direct statutory or constitutional lawmaking persisting into the present era.<sup>22</sup>

Virtually every single American state features some form of direct democracy.<sup>23</sup> However, both the nature and extent of citizen involvement permitted within each state is widely divergent. Some states provide multiple avenues through which citizens can participate directly, while other states feature far fewer mechanisms. Figure 1.1 below highlights the primary difference in approaches—between referenda and initiatives—and differentiates the landscape into seven discrete categories (A–G) which taken together comprise the domain of American Direct Democracy.

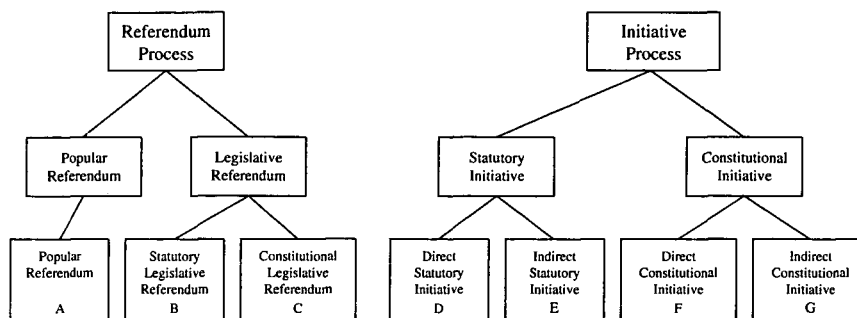
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<sup>21</sup> See, e.g., CRONIN, *supra* note 19; DAVID D. SCHMIDT, *CITIZEN LAWMAKERS: THE BALLOT INITIATIVE REVOLUTION* (1991); DANIEL A. SMITH & CAROLINE J. TOLBERT, *EDUCATED BY INITIATIVE* 19–26 (2004); Collins & Oesterle, *supra* note 19.

<sup>22</sup> Collins & Oesterle, *supra* note 19 and accompanying text. Concern about wayward political agents as well as the effectiveness of this electoral auditing mechanism typically produces calls for an alternative, more direct political process. Proponents typically argue the most effective manner to obtain compliance from political agents is to provide a mechanism which threatens to impose a majority policy if political agents shirk. For both an empirical and a game-theoretic analysis of the indirect effects of the initiative, see Elisabeth Gerber, *Legislative Response to the Threat of the Popular Initiative*, 40 AMER. J. OF POL. SCI. 99 (1996). Experience with the practice of American direct democracy may be at odds with the theoretical claims advanced by its populist advocates. See, e.g., RICHARD ELLIS, *DEMOCRATIC DELUSIONS: THE INITIATIVE PROCESS IN AMERICA* (2002); ELISABETH GERBER, *THE POPULIST PARADOX: INTEREST GROUP INFLUENCE AND THE PROMISE OF DIRECT LEGISLATION* (1999); Todd Donovan et al., *Political Consultants and the Initiative Industrial Complex*, in DANGEROUS DEMOCRACY? 101 (Larry Sabato et al. eds. 2001); Richard Ellis, *Signature Gathering in the Initiative Process: How Democratic Is It?*, 64 MONT. L. REV. 35 (2003); Arne Leonard, *In Search of the Deliberative Initiative: A Proposal for a New Method of Constitutional Change*, 69 TEMP. L. REV. 1203 (1996).

<sup>23</sup> The article adopts a broad definition of direct democracy; one that includes any mechanism that solicits the direct input of the citizenry. While many states feature multiple avenues for citizen involvement, virtually every jurisdiction in the United States embraces as a method of institutional change the Constitutional Legislative Referendum. Delaware reflects a notable exception to this trend as it does not provide for the Constitutional Legislative Referendum. See DEL. CONST. art. XVI, §§ 1–5.



Figure 1.1: The Domain of American Direct Democracy<sup>24</sup>

Working from left to right, Figure 1.1 begins by subdividing the referendum process into those measures referred to the legislature by the people and those measures that authorize the legislature to transfer a decision directly to the citizenry. The former practice, often called the Popular Referendum [A],<sup>25</sup> allows individuals and groups who collect a sufficient number of signatures to place already enacted legislation before voters for their approval. The Legislative Referendum also lies on the indirect end of the direct democratic spectrum, as it is the legislature and not the citizenry who determines which set of policy offerings will be placed upon the electoral ballot. Depending upon the nature of policy change in question, Legislative Referendum has two distinct forms. The Statutory Legislative Referendum [B], a process available in twenty-three states,<sup>26</sup> or the Constitutional Legislative Referendum [C], is a process available in virtually every state.<sup>27</sup> The key distinction between each form is the level of substantive state law.

<sup>24</sup> For definitions of each of these terms [A–G], see Figure 1.2 *infra*.

<sup>25</sup> The twenty-four states allow for the Popular Referendum are Alaska, Arizona, Arkansas, California, Colorado, Idaho, Kentucky, Maine, Maryland, Massachusetts, Michigan, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Utah, Washington and Wyoming. See INITIATIVE & REFERENDUM INST. AT UNIV. S. CAL., STATE I & R, [http://www.iandrinstute.org/statewide\\_i&r.htm](http://www.iandrinstute.org/statewide_i&r.htm) (last visited Feb. 16, 2008).

<sup>26</sup> The twenty-three states featuring the Statutory Legislative Referendum are Arizona, Arkansas, California, Delaware, Idaho, Illinois, Kentucky, Maine, Maryland, Massachusetts, Michigan, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Utah, Washington. *Id.*

<sup>27</sup> See ALA. CONST. art. XVIII, §§ 284, 287; ALASKA CONST. art. XIII, § 1; ARIZ. CONST. art. XXI, § 1; ARK. CONST. art. XIX, § 22; CAL. CONST. art. XVIII, §§ 1, 4; COLO. CONST. art. XIX, § 2; CONN. CONST. art. XII; FLA. CONST. art. XI, §§ 1, 5; GA. CONST. art. X, § 1, paras. 1–3; HAW. CONST. art. XVII, §§ 1, 3; IDAHO CONST. art. XX, § 1; ILL. CONST. art. XIV, § 2; IND. CONST. art. XVI, § 1; IOWA CONST. art. X, § 1; KAN. CONST. art. XIV, § 1; KY. CONST. § 256; LA. CONST. art. XIII, § 1; ME. CONST. art. X, § 4; MD. CONST. art. XIV, § 1; MASS. CONST. amend. art. XLVIII, part IV, §§ 1–5, part V, §§ 1, 2; MICH. CONST. art. XII, § 1; MINN. CONST. art. IX, § 1; MISS. CONST. art. XV, § 273; MO. CONST. art. XII, §§ 2(a), 2(b); MONT. CONST. art. XIV, § 8; NEB. CONST. art. XVI, § 1; NEV. CONST. art. XVI, § 1; N.H. CONST. part 2, art. 100, § a; N.J. CONST. art. IX, §§ 1, 6; N.M. CONST. art. XIX, § 1; N.Y.

Another avenue through which citizens can participate directly is the initiative. In an initiative, "citizens, collecting signatures on a petition, place advisory questions, memorials, statutes or constitutional amendments on the ballot for the citizens to adopt or reject."<sup>28</sup> The initiative processes subdivides along the division between statutory and constitutional change, and also reflects the extent of the state legislature's involvement in the process. As shown in Figure 1.1, fourteen states feature the Direct Statutory Initiative [D]<sup>29</sup> while sixteen provide for the Direct Constitutional Initiative [F].<sup>30</sup> They are "direct," as they contemplate no involvement by the executive or members of the legislature. Instead, they merely require a citizen or interest group to collect the required threshold number of signatures. The Direct Constitutional Initiative and Direct Statutory Initiative are far more prevalent than their indirect counterparts and are the most "direct" forms of direct democracy.

The Indirect Statutory Initiative [E]<sup>31</sup> and Indirect Constitutional Initiative [G]<sup>32</sup> similarly provide for signature collection but, by contrast, allow for legislative consideration of a given policy offering prior to its placement upon the electoral ballot. Nine states feature the former process while only two jurisdictions feature the Indirect Constitution making mechanism.

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CONST. art. XIX, § 1; N.C. CONST. art. XIII, § 4; N.D. CONST. art. IV, § 45; OHIO CONST. art. XVI, § 1; OKLA. CONST. art. XXIV, § 1; OR. CONST. art. IV, § 1, art. XVII, §§ 1, 2; PA. CONST. art. XI, § 1; R.I. CONST. amend. XLII, § 1; S.C. CONST. art. XVI, § 1; S.D. CONST. art. XXIII, §§ 1, 3; TENN. CONST. art. XI, § 3; TEX. CONST. art. XVII, § 1; UTAH CONST. art. XXIII, § 1; VT. CONST. ch. II, § 72; VA. CONST. art. XII, § 1; WASH. CONST. art. XXIII, § 1; W. VA. art. XIV, § 2; WIS. CONST. art. XII, § 1; WYO. CONST. art. 20, § 1.

<sup>28</sup> See Initiative & Referendum Inst. at Univ. S. Cal., What is I & R?, <http://www.iandri.institute.org/Quick%20Fact%20-%20What%20is%20I&R.htm> (last visited Feb. 16, 2008). By contrast, a referendum is a process that allows the legislature to propose legislation to the voters for them to accept or reject. *Id.*

<sup>29</sup> See ARIZ. CONST. art. XXI, § 1; ARK. CONST. art. XIX, § 22; CAL. CONST. art. XVIII, §§ 1, 4; COLO. CONST. art. XIX, § 2; IDAHO CONST. art. XX, § 1; MO. CONST. art. XII, §§ 2(a), 2(b); MONT. CONST. art. XIV, § 8; NEB. CONST. art. XVI, § 1; N.D. CONST. art. IV, § 45; OKLA. CONST. art. XXIV, § 1; OR. CONST. art. IV, § 1, art. XVII, §§ 1, 2; S.D. CONST. art. XXIII, §§ 1, 3; UTAH CONST. art. XXIII, § 1; WASH. CONST. art. XXIII, § 1.

<sup>30</sup> See ARIZ. CONST. art. XXI, § 1; ARK. CONST. amend. VII; CAL. CONST. art. II, §§ 8, 10, art. XVIII, § 3; COLO. CONST. art. V, § 1; FLA. CONST. art. XI, §§ 3, 5; ILL. CONST. art. XIV, § 3; MICH. CONST. art. XII, § 2; MO. CONST. art. III, §§ 50, 51; MONT. CONST. art. XIV, § 9; NEB. CONST. art. III, §§ 2, 4; NEV. CONST. art. XIX, §§ 2, 4; N.D. CONST. art. III, §§ 1-10; OHIO CONST. art. II, §§ 1(a), 1(b); OKLA. CONST. art. V, §§ 2, 3; OR. CONST. art. IV, §§ 2-4; S.D. CONST. art. XXIII, §§ 1, 3.

<sup>31</sup> See ALASKA CONST. art. XIII, § 1; ME. CONST. art. X, § 4; MASS. CONST. amend. art. XLVIII, part IV, §§ 1-5, part V, §§ 1-2; MICH. CONST. art. XII, § 1; NEV. CONST. art. XVI, § 1; OHIO CONST. art. XVI, § 1; UTAH CONST. art. XXIII, § 1; WASH. CONST. art. XXIII, § 1; WYO. CONST. XX, § 1.

<sup>32</sup> The Indirect Constitutional Initiative states are Massachusetts and Mississippi. See MASS. CONST. art. XLVIII; MISS. CONST. art. XV, § 273.

Figure 1.2: Summary of Direct Democracy Processes<sup>33</sup>

- A- *Popular Referenda*—Citizens have the power to refer, by collecting signatures on a petition, specific legislation that was already enacted by their legislature to the people to either accept or reject.
- B- *Statutory Legislative Referenda*—Legislators permitted to place a statutory proposal before voters for acceptance or rejection.
- C- *Constitutional Legislative Referenda*—Legislators permitted to place a constitutional change before voters for acceptance or rejection.
- D- *Direct Statutory Initiative*—Citizens may, without any legislative involvement, place statutory proposals before voters for their acceptance or rejection.
- E- *Indirect Statutory Initiative*—Citizens must submit a statutory proposal to the state legislature for its consideration before it can be placed on the ballot for voter approval or rejection.
- F- *Direct Constitutional Initiative*—Citizens may, without any legislative involvement, submit a constitutional change to voters for their acceptance or rejection.
- G- *Indirect Constitutional Initiative*—Citizens must submit a constitutional change to the state legislature for its consideration before it can be placed on the ballot for voter approval or rejection.

#### B. DATA INFORMED SPECULATION: THE CURRENT TRENDS IN AMERICAN DIRECT DEMOCRACY

Much of the recent legal and social scientific literature on the state of American Direct Democracy directs attention to the aggregate increase in the use of citizen initiatives.<sup>34</sup> While Part I.A describes how four differentiable and discrete processes fall within the larger family of initiatives, Part I.B reviews the recent trends in citizen-directed lawmaking with direct reference to the use and electoral success of these initiative sub-categories. This disaggregation demonstrates that within jurisdictions featuring the Direct Constitutional Initiative [F], there have been dramatic increases in the appeal of this particular lawmaking process in recent years. For these states, the recent surge of American Direct Democracy should substantially be characterized as a constitutional phenomenon.

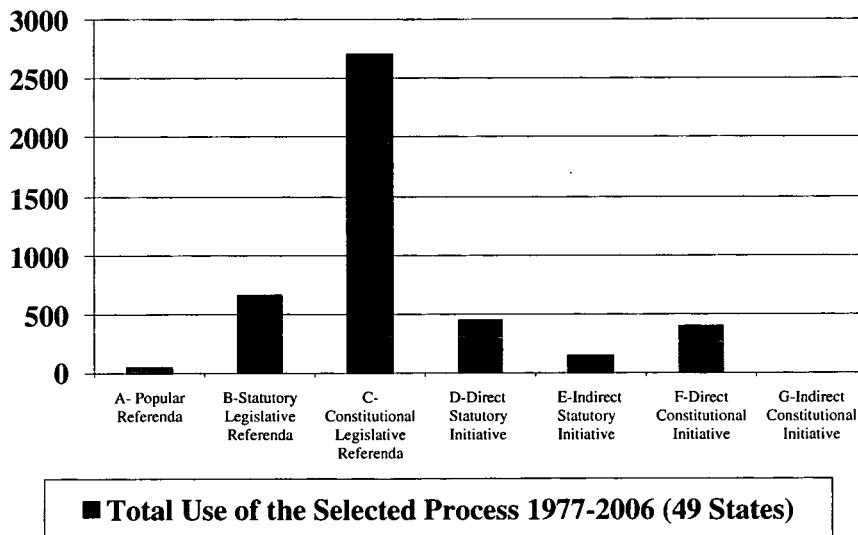
<sup>33</sup> Definitions drawn from the I & R Institute. See Initiative & Referendum Inst. at Univ. S. Cal., What is I & R?, <http://www.iandrinstute.org/Quick%20Fact%20-%20What%20is%20I&R.htm> (last visited Feb. 16, 2008).

<sup>34</sup> See, e.g., MATSUSAKA, *supra* note 20, at 6; M. Dane Waters, *People Power: Initiative and Referendum in the United States*, in DEMOCRACY: HOW DIRECT?: VIEWS FROM THE FOUNDING ERA AND THE POLLING ERA 101 (Elliott Abrams ed., 2002); M. Dane Waters, *Trends in State Initiatives and Referenda*, in THE BOOK OF STATES (2002).

### 1. *Use Across Direct Democracy's Respective Processes*

Part I.A asserts an expansive definition of Direct Democracy—one that encompasses the entire host of referenda and initiative style processes. While the ultimate focus of this article is the sixteen Direct Constitutional Initiative (DCI) jurisdictions, it is still worthwhile to consider the position of these jurisdictions relative to other jurisdictions and citizen-involved lawmaking vehicles. Figure 1.3, drawn from forty-nine states, depicts the relative distribution of lawmaking attributable to each direct democratic lawmaking process. As states have different combinations of available processes, this type of global aggregation should be viewed with caution. For example, as mentioned earlier, virtually every state features the Constitutional Legislative Referenda.<sup>35</sup> Given its widespread availability, it is not surprising that its uptake dominates all other processes.

Figure 1.3: The Distribution of Direct Democratic Ballot Measures 1977–2006 (49 States)<sup>36</sup>



In contrast to Figure 1.3, Figure 1.4 displays the relative frequency of each particular direct democratic process over the past three decades, within the DCI jurisdictions.<sup>37</sup> Similar to Figure 1.3, the Constitutional Legislative Referendum [C] far outpaced any competing lawmaking process. It is important, however, not to place undue weight upon such aggregate longitudinal data. Specifically, the relative share of change

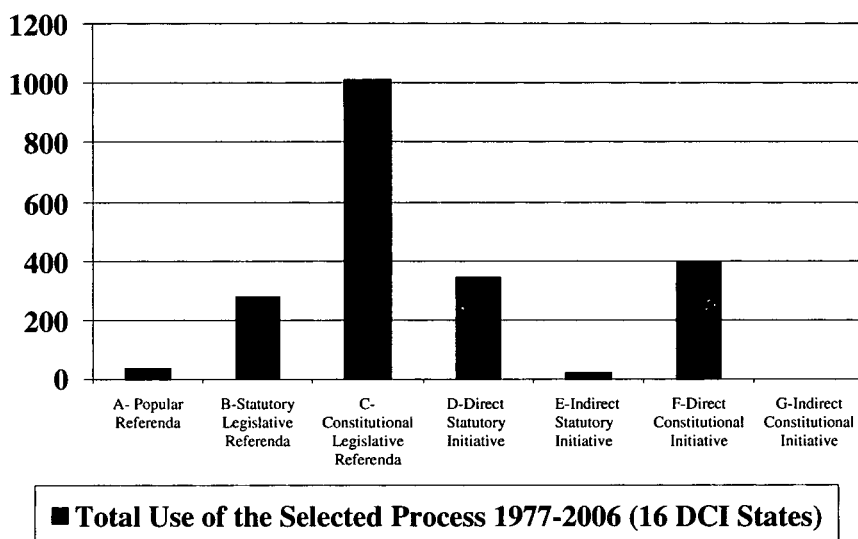
<sup>35</sup> For list of “CLR States,” see *supra* note 27.

<sup>36</sup> *Id.* These charts include tallies for all states except Delaware.

<sup>37</sup> For list of “DCI States,” see *supra* note 30.

undertaken pursuant to the Direct Constitutional Initiative [F] increased rapidly while the corresponding use of the Constitutional Legislative Referendum declined steadily.<sup>38</sup>

Figure 1.4: The Distribution of Direct Democratic Ballot Measures 1977–2006 (16 DCI States)<sup>39</sup>



## 2. *The Direct Statutory Initiative and Direct Constitutional Initiative*

A substantial portion of the Direct Democracy literature focuses on recent aggregate increases in the use of citizen initiatives.<sup>40</sup> This trend is compelling for a variety of reasons. Most notably, direct democracy in its most “direct” form reflects a divergence from the general American lawmaking apparatus because it contemplates no role for legislative authorities.

As depicted in Figure 1.1 four separate processes fall under the general heading of citizen initiative. The division of these available initiative mechanisms reveals longitudinal trends. Specifically, when consideration is restricted to the sixteen states that provide for the Direct Constitutional Initiative [F], the data demonstrate that this process far outpaces the complementary statutory process. Figure 1.5 highlights this

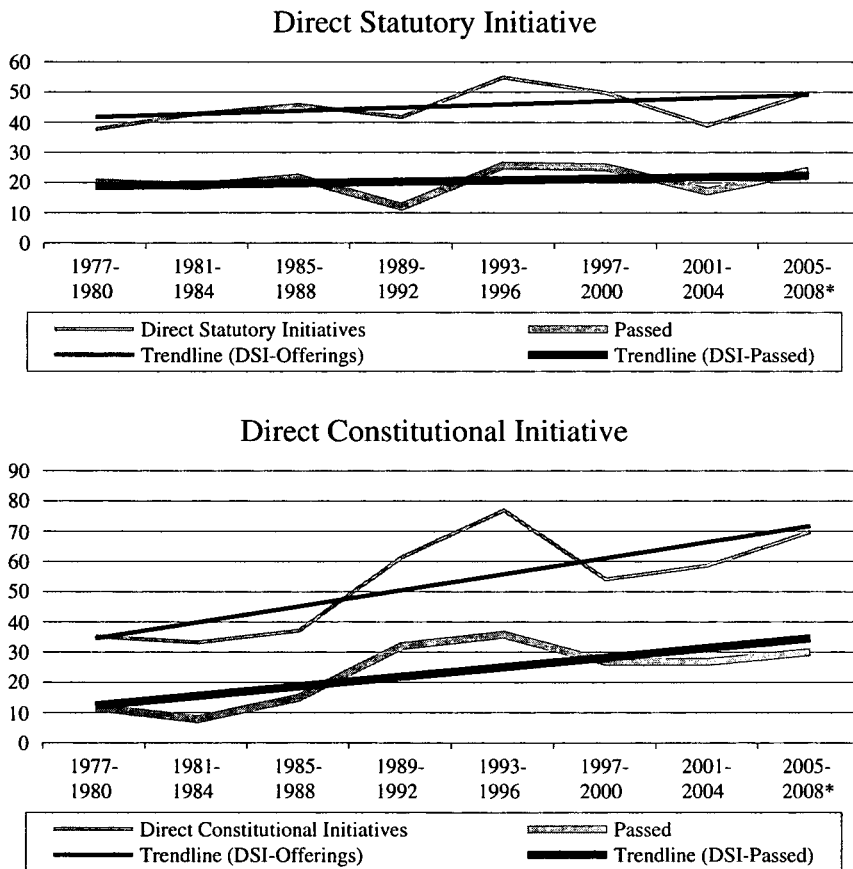
<sup>38</sup> While the Constitutional Legislative Referendum [C] historically dominates all other lawmaking methods, Figure 1.6 *infra* demonstrates how the past decades have witnessed the steady decline in the use of this process. Simultaneously, Figure 1.6 *infra* demonstrates how use of the Direct Constitutional Initiative has nearly doubled.

<sup>39</sup> For a list of the sixteen states featuring the Direct Constitutional Initiative, see *supra* note 30.

<sup>40</sup> For a small share of this larger literature, see *supra* note 34.

point, comparing within the sixteen relevant states, the proposal and passage rates for the Direct Constitutional [F] and Direct Statutory [D] Initiatives. While Figure 1.4 demonstrates that these processes have relatively equal historical totals, the use of the Direct Constitutional Initiative nearly doubled while the trend-line accompanying the statutory process remained far more consistent in recent years.

Figure 1.5: Comparing the Direct Statutory and Direct Constitutional Initiative Within the 16 DCI States<sup>41</sup>



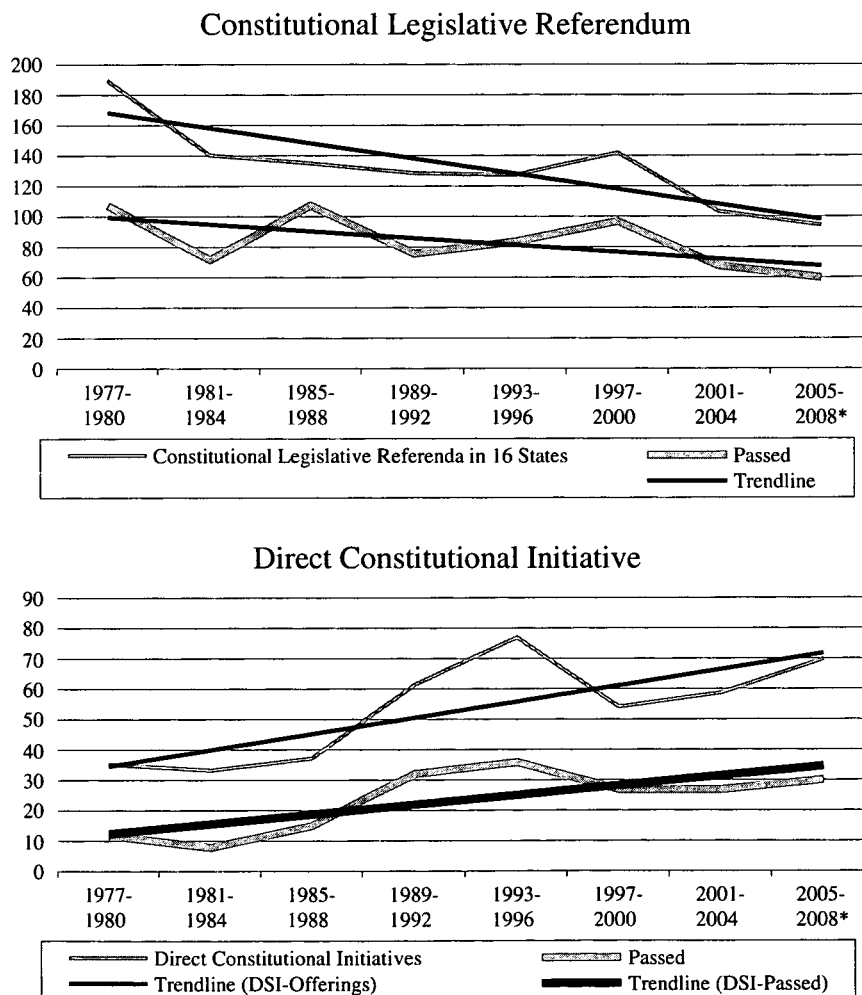
### 3. *Constitutional Legislative Referendum and the Direct Constitutional Initiative*

Over the past few decades, the Direct Constitutional Initiative not only outpaced its statutory counterpart but also played an increasing role

<sup>41</sup> To create comparable graphics, the Direct Statutory Initiative graphic is slightly smaller than the Direct Constitutional Initiative graphic. These comparisons are drawn within the sixteen jurisdictions which feature the Direct Constitutional Initiative.

in driving constitutional change.<sup>42</sup> Namely, within jurisdictions that provide for both the Constitutional Legislative Referendum [C] and the Direct Constitutional Initiative [F], the latter process steadily increased while the use of the former mechanism steadily declined. Figure 1.6 displays, in longitudinal format, how use of the Constitutional Legislative Referendum has been cut in half while the frequency of the Direct Constitutional Initiative has nearly doubled.

Figure 1.6: Comparing the Constitutional Amendment Processes Within the 16 DCI States<sup>43</sup>

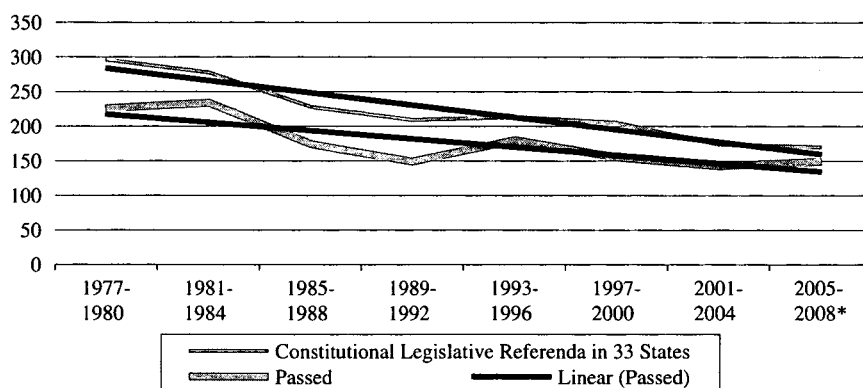


<sup>42</sup> See Figure 1.6 *infra*.

<sup>43</sup> This comparison is drawn within the sixteen jurisdictions which feature the Direct Constitutional Initiative. For a listing of states using the Direct Constitutional Initiative, see *supra* note 30.

It is possible the depicted decline in the use of the Constitutional Legislative Referendum is some artifact of the data binning process. To assuage such concerns, consider Figure 1.7 which depicts the longitudinal use of the Constitutional Legislative Referenda in the thirty-three Non-DCI states. In these states, the Constitutional Legislative Referenda is essentially the only mechanism to amend the state's constitution.<sup>44</sup> Confining the analysis to these thirty-three states, Figure 1.7 mirrors the trend displayed in Figure 1.6. Thus, while there may be other omitted variables this analysis does not capture, taken together, these graphics indicate that the Direct Constitutional Initiative amplifies the amount of constitutional change in a number of American states.

Figure 1.7: The Use of the Constitutional Legislative Referendum in Non-DCI States<sup>45</sup>



Where available, the Direct Constitutional Initiative is quickly becoming the method of choice for citizen lawmakers. Its rate of increase far outpaces any alternative statutory or constitutional lawmaking process, such as the Direct Statutory Initiative or the Constitutional Legislative Referendum. The increasing advent of state constitutional change, undertaken pursuant to this particular process, requires a review of the exact nature of the incentive structure that encourages this empirical trend. It is this specific question that is confronted in Part II of this article.

<sup>44</sup> This statement should be slightly qualified. In a number of these thirty-three states, it is possible to call for a constitutional convention. For a discussion of revision by convention, see generally Benjamin, *supra* note 11, at 191-200.

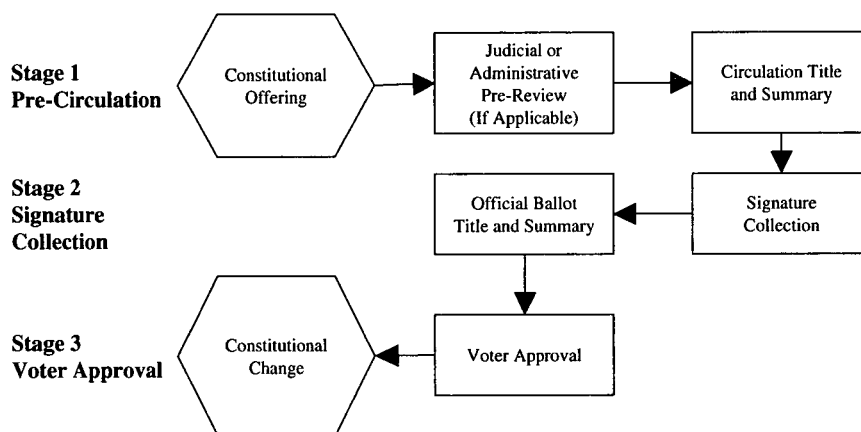
<sup>45</sup> The thirty-three non-DCI States tallied in Figure 1.7 reflect the states of union minus the DCI sixteen states and Delaware.



## II. THE MICRO-FOUNDATIONS OF AN EMPIRICAL TREND: A COMPARATIVE CONSIDERATION OF THE DIRECT CONSTITUTIONAL INITIATIVE PROCESS

The path between the proposal of a Direct Constitutional Initiative and a change in the institutional form involves a series of procedural stages set forth below in Figure 2.1. In order to be successful, a potential proposer, seeking directly to change a constitution, must navigate a particular policy offering from inception to final approval. While Figure 2.1 depicts the basic mechanism, the specific nature of each jurisdiction's process varies at each of the stages described below.

Figure 2.1: The Path from Proposal to Passage



### A. FROM PROPOSAL TO PASSAGE: THE CONSTITUTIONAL INITIATIVE PROCESS

#### *Stage 1: Out of the Starting Blocks: The Pre-Circulation Period*

Whether a statutory or constitutional initiative, the process begins with an individual citizen or interest group devising a particular policy change. Proposers typically must submit the offering to an authorized state official for pre-circulation review.<sup>46</sup> Thus, the secretary of state, attorney general, or some other authorized individual provides a first-order level of review designed to filter out unmeritorious policy offerings such as those which might violate the single subject rule, contain inconsistent or ambiguous language, or violate the federal Constitution.<sup>47</sup> The

<sup>46</sup> See, e.g., Collins & Oesterle, *supra* note 19, at 93–99; John Cooper, *The Citizen Initiative Petition to Amend State Constitutions: A Concept Whose Time Has Passed, or a Vigorous Component of Participatory Democracy at the State Level?*, 28 N.M. L. REV. 227, 241 (1998); Ellis, *supra* note 22, at 35; Douglas Michael, *Judicial Review of Initiative Constitutional Amendments*, 14 U.C. DAVIS L. REV. 461 (1980).

<sup>47</sup> Many states that authorize most direct forms of direct democracy also impose the limitation that proposals embrace a single subject. For an excellent survey of these rules, see

intensity of this pre-review differs across jurisdictions as some regimes only allow officials to provide advisory recommendations while others allow for the wholesale rejection of certain proposals.<sup>48</sup>

Assuming a proposal passes the initial threshold, it must next obtain a circulation title and summary through a process dictated by state law.<sup>49</sup> Across the respective jurisdictions, some states allow the proponents of a given measure to draft the caption and summary while others require this caption and summary to be crafted by a designated state officer.<sup>50</sup> The language of the circulation title and summary should be considered significant because voters use this basic information when determining whether to provide a signature to the given proposal.<sup>51</sup> Because of its importance, disputes regarding the nature of the title and summary can arise.<sup>52</sup> In response, a number of states provide for expedited judicial review of all title and caption related matters.<sup>53</sup>

### *Stage 2: Garnering Threshold Support: The Signature Collection Period*

Once the title and summary are established, the process next requires the proponent of a given constitutional change to make a threshold showing of public support in order to see their particularized reform effort placed before voters. While the uniform method of this demonstration is the collection of signatures, the specific requirements vary across

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Rachael Downey et al., *A Survey of the Single Subject Rule as Applied to Statewide Initiatives*, 13 J. CONTEMP. LEGAL ISSUES 579 (2004). For a description of the relationship between the single subject rule and Arrow's Impossibility Theorem, see Robert D. Cooter & Michael D. Gilbert, *Chaos, Direct Democracy, and the Single Subject Rule*, AM. L. & ECON. ASS'N ANN. MEETING (Apr. 28, 2006), <http://law.bepress.com/cgi/viewcontent.cgi?article=1849&context=alea>; Thad Kousser & Mathew McCubbins, *Social Choice, Crypto-Initiatives and Policymaking by Direct Democracy*, 78 S. CAL. L. REV. 949 (2005). For a critique of the use of the single subject rule, see Richard L. Hasen, *Ending Court Protection of Voters from the Initiative Process*, 116 YALE L.J. POCKET PART 117 (2006), <http://yalelawjournal.org/images/pdfs/71.pdf>.

<sup>48</sup> For example, the Florida Constitution directs that:

[T]he attorney general shall, as directed by general law, request the opinion of the justices of the supreme court as to the validity of any initiative petition circulated pursuant to Section 3 of Article XI. The justices shall, subject to their rules of procedure, permit interested persons to be heard on the questions presented and *shall render their written opinion no later than April 1 of the year in which the initiative is to be submitted to the voters pursuant to Section 5 of Article XI.*

FLA. CONST. art. IV, §10 (emphasis added). Other jurisdictions do not permit such pre-review. For a complete listing, see M. DANE WATERS, *THE INITIATIVE AND REFERENDUM ALMANAC* 15 (2003).

<sup>49</sup> William Lund, *What's in a Name? The Battle Over Ballot Titles in Oregon*, 34 WILAMETTE L. REV. 143 (1998).

<sup>50</sup> *Id.*

<sup>51</sup> See Part III.C.1 *infra*; see also ELLIS, *supra* note 22, at 71–90; Michael Kang, *Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and "Disclosure Plus,"* 50 UCLA L. REV. 1141 (2003); Lund, *supra* note 49.

<sup>52</sup> See Lund, *supra* note 49.

<sup>53</sup> WATERS, *supra* note 48, at 16–17.

jurisdictions. Table 2.1 outlines the signature requirements for the subset of states that provide for the Direct Constitutional Initiative. Even a cursory review of this table demonstrates interstate variance in not only the percentage of signatures but also the pool from which the requisite number is chosen. For example, compare North Dakota, which uniquely chooses to require a proposer to collect signatures of 4% of the jurisdictions total population, with states such as Arizona and Oklahoma, each of which demand 15% of the total votes cast for governor in the last gubernatorial election. Between these extremities lie states such as California, Illinois, Missouri, and Oregon, all of whom display a rule requiring 8% of the total votes cast for governor in the last election. Many other states feature similar percentages but peg their thresholds to the total number of votes cast in the most recent presidential election, secretary of state's contest, or general election.

In addition to the thresholds, Table 2.1 also describes the variety of geographical distribution requirements across the respective states. While half of jurisdictions forego any distributional requirements, the balance of the sixteen states featuring the Direct Constitutional Initiative impose some form of geographic limitation. States are evenly divided regarding the appropriate unit against which to peg their limitations as they either require the support of minimal number of counties or Congressional districts.

Finally, the table highlights the major time restrictions imposed upon signature gatherers. These include the total time allocated for signature collection as well as the deadline for submission of signatures. Like all other elements of the analysis, states significantly vary in their regulation of this question. For example, South Dakota requires signature submissions one year prior to election day while many other states impose a mere 90-day deadline. Similarly, consider Arkansas and Oklahoma, which impose vastly different circulation periods with the former providing an unlimited collection period while the latter allows a 90-day collection window.

Table 2.1: Direct Constitutional Initiative Signature Requirements<sup>54</sup>

STATE	Number of Signatures for Constitutions	Geographic Distribution	Deadline for Submission	Circulation Period for Constitutional Amendments
Arizona	15% of total votes cast for governor	None	4 Months Prior to Election	20 Months
Arkansas	10% of total votes cast for governor	5% in 15 of 75 counties	4 Months Prior to Election	Unlimited
California	8% of total votes cast for governor	None	No Later than 131 Days Prior	150 Days
Colorado	5% of total votes cast for sec'y of state	None	3 month Prior to Election	6 months
Florida	8% of total votes cast for President	8% in 12 of 23 of Cong. Districts	90 Days Prior to Election	4 Years
Illinois	8% of total votes cast for governor	None	6 months Prior to Election	24 months
Michigan	10% of total votes cast for governor	None	120 Days Prior to Election	180 Days
Missouri	8% of total votes cast for governor	8% in 2/3 of the Cong. Districts	8 Months Prior to Election	16 Months
Montana	10% of total votes cast for governor	10% Required in 1/2 of the Counties	Second Friday of Fourth Month Prior to Election	1 Year
Nebraska	10% of total votes cast for governor	10% Must Include 5% in 2/5 of the Counties	4 Months Prior	1 Year
Nevada	10% of total votes cast in last general election	10% of 3/4 of the Counties	90 Days Prior	11 months
North Dakota	4% of total state population	None	90 Days Prior	1 Year
Ohio	10% of total votes cast for governor	5% in 1/2 of the Counties	90 Days Prior	1 Year
Oklahoma	15% of total votes cast for governor	None	8 Months Prior	90 Days
Oregon	8% of total votes cast for governor	None	4 Month Prior	Unlimited
South Dakota	10% of total votes cast for governor	None	1 Year Prior	1 Year

<sup>54</sup> This table is compiled from JOHN DINAN, *THE BOOK OF STATES* 11–13 (2006); WATERS, *supra* note 48, at 28–29.

While the signature thresholds typically fall within a fairly narrow range, the raw number of signatures required varies quite dramatically. Table 2.2 displays estimates of the actual signatures required to propose a Direct Constitutional Initiative and a Direct Statutory Initiative in each respective DCI state. It then compares those thresholds to the levels required to offer the Direct Statutory Initiative. A review of this table highlights how most jurisdictions, which feature both statutory and constitutional initiative processes, only marginally differentiate their respective signature requirements. At the extreme, Colorado, for example, imposes identical signature requirements.

Table 2.2: Comparing the Constitutional & Statutory  
Initiative Signature Requirements<sup>55</sup>

STATE	Number of Signatures for Constitutions	2002 Estimated Number	Number of Signatures for Statutes	2002 Estimated Number
Arizona	15% of total votes cast for governor	152,643	10% of total votes cast for governor	101,762
Arkansas	10% of total votes cast for governor	70,602	8% of total votes cast for governor	54,481
California	8% of total votes cast for governor	670,816	5% of total votes cast for governor	419,094
Colorado	5% of total votes cast for sec'y of state	80,571	5% of total votes cast for sec'y of state	80,571
Florida	8% of total votes cast for President	488,722	Not Permitted	N/A
Illinois	8% of total votes cast for governor	280,000	Not Permitted	N/A
Michigan	10% of total votes cast for governor	302,710	8% of total votes cast for governor	242,169
Missouri	8% of total votes cast for governor	120,571	5% of total votes cast for governor	73,356
Montana	10% of total votes cast for governor	41,019	5% of total votes cast for governor	20,500
Nebraska	10% of total votes cast for governor	108,500	7% of total votes cast for governor	76,000
Nevada	10% of total votes cast in last general election	61,366	10% of total votes cast in last general election	61,366
North Dakota	4% of total state population	25,552	2% of total state population	12,776
Ohio	10% of total votes cast for governor	334,624	6% of total votes cast for governor	200,774
Oklahoma	15% of total votes cast for governor	185,135	8% of total votes cast for governor	98,739
Oregon	8% of total votes cast for governor	89,048	6% of total votes cast for governor	66,786
South Dakota	10% of total votes cast for governor	26,019	5% of total votes cast for governor	13,010

<sup>55</sup> This table is compiled from WATERS, *supra* note 48, at 21.

*Stage 3: Taking It to the People: Voter Approval*

Whether proposed by legislative authorities or through a citizen initiative mechanism, the ultimate ratification of a Constitutional Amendment is a power exclusively reserved to the people of the respective state. Therefore, Table 2.3 below features the ratification rules for each of the sixteen states that feature the Direct Constitutional Initiative as well as the two jurisdictions that provide the Indirect Constitutional Initiative.

Table 2.3 demonstrates that most of these states embrace the simple majority vote. Some jurisdictions, however, employ slightly different rules. For example, Massachusetts and Mississippi, the two states that feature the Indirect Constitutional Amendment mechanism, require not only majority support but also demand that a given proposal receive a certain percentage of votes cast in the election.<sup>56</sup> Similarly, although a Direct Constitutional Amendment jurisdiction, Nebraska punishes undervotes by requiring that constitutional initiatives receive both majority support as well as 35% of the total votes cast in the election.<sup>57</sup>

Nevada displays the most unusual method of ratification by holding that a constitutional change offered through the direct amendment process must receive majority support in two consecutive general elections.<sup>58</sup> In contrast, beyond its general majority ratification requirement, Oregon law contains an important caveat requiring any proposal instituting a supermajority requirement be approved by the same threshold it seeks prospectively to apply.<sup>59</sup> As such, Oregon law seeks to avoid an outcome similar to that displayed in Florida during the 2006 election cycle. There, Florida voters adopted, with 58% support, a supermajority requirement holding that all subsequent constitutional amendments must receive 60% support.<sup>60</sup>

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<sup>56</sup> See WATERS, *supra* note 48, at 21.

<sup>57</sup> *Id.*

<sup>58</sup> NEV. CONST. art. 19, § 2.

<sup>59</sup> See generally *Nesbitt v. Myers*, 978 P.2d 378, 378–79 (Or. 1999) (“In the 1998 general election, voters approved Ballot Measure 63. That measure amended the Oregon Constitution to require that, in all future elections for initiated or referred measures, ‘[a]ny measure that includes any proposed requirement for more than a majority of votes cast by the electorate to approve any change in law or government action shall become effective only if approved by at least the same percentage of voters specified in the proposed voting requirement.’”).

<sup>60</sup> Constitutional Amendment Number 3 passed by 57.8% of voters in the 2006 cycle: [Amends] Section 5 of Article XI of the State Constitution to require that any proposed amendment to or revision of the State Constitution, whether proposed by the Legislature, by initiative, or by any other method, must be approved by at least 60 percent of the voters of the state voting on the measure, rather than by a simple majority. This proposed amendment does not change the current requirement that a proposed constitutional amendment imposing a new state tax or fee be approved by at least 2/3 percent of the voters of the state voting in the election in which such an amendment is considered.

FL. DEP’T OF STATE DIV. OF ELECTIONS, PROPOSED CONSTITUTIONAL AMENDMENTS TO BE VOTED ON NOVEMBER 7, 2006, at 4–5, [http://election.dos.state.fl.us/initiatives/pdf/2006\\_prop\\_](http://election.dos.state.fl.us/initiatives/pdf/2006_prop_)

Table 2.3: Ratification Requirements for the Direct Constitutional Initiative<sup>61</sup>

STATE	Vote Required for Ratification of an Amendment
Arizona	Majority
Arkansas	Majority
California	Majority
Colorado	Majority
Florida	60%
Illinois	Majority of those voting in the election or 3/5 voting on amendment
Massachusetts	Majority and 30% of total votes cast in the election
Michigan	Majority
Mississippi	Majority and 40% of total votes cast in the election
Missouri	Majority
Montana	Majority
Nebraska	Majority and 40% of total votes cast in the election
Nevada	Majority in two consecutive general elections
North Dakota	Majority
Ohio	Majority
Oklahoma	Majority
Oregon	Majority
South Dakota	Majority

An aggregate review of the preceding tables demonstrates that significant inter-jurisdictional variance exists with respect to the Direct Constitutional Initiative process. The same, however, cannot be said when an intra-jurisdictional comparison of the Direct Constitutional Initiative and Direct Statutory Initiative is entertained. Simply put, within a given state, there is an overwhelming similarity between these two direct lawmaking mechanisms. With the exception of the signature thresholds, the intrastate differences in the balance of these processes, from proposal to passage, are relatively negligible. Specifically, in every jurisdiction featuring both the Constitutional and Statutory Initiative processes, the pre-review method for certifying the title, caption, and summary, as well as comparable thresholds for ultimate voter ratification, are exceedingly similar.

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consti\_amend.pdf; Florida Dep't of State, Elections Results, <http://election.dos.state.fl.us/elections/resultsarchive/index.asp?ElectionDate=11/7/2006> (then select "Const. Amendments" from "Select Office" drop-down box) (last visited Feb. 16, 2008);

<sup>61</sup> This table is compiled from DINAN, *supra* note 54, 13 (2006); WATERS, *supra* note 48, at 26.



## B. THE DIRECT CONSTITUTIONAL INITIATIVE VERSUS CONSTITUTIONAL LEGISLATIVE REFERENDUM

Since each jurisdiction that features the Direct Constitutional Initiative mechanism also features the Constitutional Legislative Referendum, the process accompanying this alternative Constitution-making vehicle also must be comparatively considered. Within these jurisdictions and across the two proposal methods, the ratification mechanism is consistent, as voters ultimately pass on the fate of a given proposal. At the same time, and by definition, the proposers, as well as the costs they face, vary significantly.

Table 2.4 below sets forth the thresholds for legislative proposal within the sixteen states that feature the Direct Constitutional Initiative. The table displays a host of states who impose supermajority requirements, with several jurisdictions requiring votes of at least two-thirds of the legislature. Montana goes even further by requiring both a supermajority as well as bicameral support prior to the placement of a proposal on the ballot.

To further the comparative consideration of these mechanisms, Table 2.4 juxtaposes the signature thresholds against the thresholds for legislative vote. In reviewing these requirements, a systematic relationship between them does not readily appear. Specifically, many states that impose relatively stringent thresholds upon one process do not impose such exacting standards upon the competing processes. Colorado requires a stringent two-thirds vote of the legislature, but in turn asks those advocating a Direct Constitutional Initiative to obtain the signatures equal to 5% of those who voted in the last secretary of state's race. By contrast, Oklahoma requires a mere majority legislative vote but imposes a significant 15% signature requirement. Nevada crafts a 10% signature threshold but then imposes a significant constraint by requiring votes of two consecutive sessions of the state legislature prior to placement of a constitutional amendment upon the ballot.<sup>62</sup>

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<sup>62</sup> This is similar to the double majority requirement it imposes on proposals offered through the Direct Constitutional Initiative. Yet, it is worth noting this particular requirement is related not to ratification but merely the proposal of the given offering.

Table 2.4: Comparing the Thresholds for Proposal of a Constitutional Change<sup>63</sup>

STATE	Legislative Vote for Proposal	Consideration by Multiple Sessions	Number of Signatures for Constitutions
Arizona	Majority	No	15% of total votes cast for governor
Arkansas	Majority	No	10% of total votes cast for governor
California	2/3	No	8% of total votes cast for governor
Colorado	2/3	No	5% of total votes cast for sec'y of state
Florida	3/5	No	8% of total votes cast for President
Illinois	3/5	No	8% of total votes cast for governor
Michigan	2/3	No	10% of total votes cast for governor
Missouri	Majority	No	8% of total votes cast for governor
Montana	2/3 (both houses)	No	10% of total votes cast for governor
Nebraska	3/5	No	10% of total votes cast for governor
Nevada	Majority	Yes	10% of total votes cast in last general election
North Dakota	Majority	No	4% of total state population
Ohio	3/5	No	10% of total votes cast for governor
Oklahoma	Majority	No	15% of total votes cast for governor
Oregon	Majority 2/3 to Revise	No	8% of total votes cast for governor
South Dakota	Majority	No	10% of total votes cast for governor

Considering the incentive structure set forth herein, it is hardly surprising that participants in direct democracy are increasingly drawn to the Direct Constitutional Initiative. The institutional rules displayed across the selected jurisdictions support the dual empirical findings of stagnation in the use of the Direct Statutory Initiative and decline in up-take of the Constitutional Legislative Referendum. Specifically, a review of Tables 2.1–2.3 shows that many states offer identical statutory and constitutional proposal thresholds. At the same time, there are sig-

<sup>63</sup> This table is compiled from JOHN DINAN, *supra* note 54, at 11–13; WATERS, *supra* note 48, at 28–29.

nificant benefits to proposers for employing constitutional change.<sup>64</sup> As demonstrated by Table 2.4, in a number of jurisdictions, the prospect for proposal of any Constitution Legislative Referendum is stymied by supermajority or other heightened thresholds. This leaves the Direct Constitutional Initiative as the most viable option for lasting substantive change.

### III. CONSTITUTIONAL DIRECT DEMOCRACY MEETS ITS CRITICS

Part III considers the attractiveness of the institutional forms driving the empirical trends uncovered and explored in earlier portions of the article. It begins by considering work by a host of prominent legal commentators, many of whom raise concerns regarding the ability of courts to police direct democracy and in particular constitutional direct democracy. Given the unease about the efficacy of oversight and with an understanding that constitutions are sticky and may prove difficult to unwind once adopted, this Part develops a set of procedural mechanisms aimed to increase the probability that initial modifications of state constitutions are, in fact, robustly supported.

#### A. JUDICIAL REVIEW OF DIRECT DEMOCRACY

What role should the courts play in interpreting ballot measures? Legal scholars have debated the question of differential treatment—whether courts should take a “hard look”<sup>65</sup> at direct democratic initiatives that they would not employ for legislation passed by a deliberative body. The late Professor Julian Eule argued that courts should look more closely when the voters enact a law without a complementary legislative action, particularly where minority interests are implicated.<sup>66</sup> His famous “hard judicial look theory” suggests a more aggressive approach to judicial review for this set of direct democratic measures.<sup>67</sup> Professor Eule asserts that it is unlikely that state courts will rule that popular enactments, either statutory or amendatory, violate existing state constitutions.<sup>68</sup> Professor Eule finds it especially unlikely that searching review will occur in the sixteen states that are the focus of this article—where constitutions can be amended directly without legislative review or

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<sup>64</sup> Most notably, as will be discussed *infra* in Part III.A, use of the constitutional process amendment may severely limit the ability of judicial actors or the legislature to subsequently nullify the decisions reached by the voting majority.

<sup>65</sup> Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1558 (1990).

<sup>66</sup> *Id.* at 1558–73.

<sup>67</sup> *Id.* at 1545–47.

<sup>68</sup> *Id.*

veto.<sup>69</sup> According to Eule, in these sixteen states, “sovereignty truly vests in an electoral majority.”<sup>70</sup> Since state courts, particularly in those sixteen states, will likely defer to the voters, federal courts step into the role of actively arbitrating democratically-enacted laws.<sup>71</sup>

Other scholars have attempted to create rules for interpreting democratically enacted measures. In her study of state court decisions from 1984 and 1994 concerning the interpretation of legislative initiatives, Professor Schacter focuses on the difficulty of courts determining popular “intent.”<sup>72</sup> Ultimately, she argues for a different method—a set of “metademocratic” rules. These rules guard against two distinct problems of popular democracy—lack of information by the voters, and inequity or lack of clarity in the initiative process.<sup>73</sup> To address the information gap, she proposes liberal rules for amicus participation and intervention. When the process appears biased or the language confusing, she proposes construing the language narrowly.<sup>74</sup>

Professor Frickey contends that one should combine Professor Eule’s focus on federal constitutionality and Professor Schacter’s focus on statutory interpretation by relying on a quasi-constitutional interpretive approach.<sup>75</sup> In balancing both popular sovereignty and constitutional values, Professor Frickey imports interpretive canons—1) avoiding constitutional invalidation, 2) narrowly construing propositions when there is a conflict with existing law, and 3) paying more attention to established canons of law (such as the rule of lenity) where direct democracy is involved.<sup>76</sup>

By contrast, Professor Tushnet rejects the notion of “differential standards of review.”<sup>77</sup> He argues that the three reasons proffered for reviewing direct democracy differently than legislative action—lack of deliberation, the bifurcated decision (and lack of logrolling), and struc-

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<sup>69</sup> *Id.* at 1546.

<sup>70</sup> *Id.*

<sup>71</sup> *See id.* at 1586.

<sup>72</sup> Jane S. Schacter, *The Pursuit of ‘Popular Intent’: Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107 (1995).

<sup>73</sup> *See id.*

<sup>74</sup> *See id.* at 155–59.

<sup>75</sup> *See* Philip P. Frickey, *Interpretation on the Borderline: Constitution, Canons, Direct Democracy*, 1996 ANN. SURV. AM. L. 477, 510 (1996).

<sup>76</sup> *See id.* at 522–23; *see also* Elizabeth Garrett, *Who Directs Direct Democracy?*, 4 U. CHI. L. SCH. ROUNDTABLE 21, 34–35 (1997) (urging courts to characterize “hard to classify” popular enactments including constitutional amendments as legislative actions, therefore subject to legislative modification); Note, *Judicial Approaches to Direct Democracy*, 118 HARV. L. REV. 2748, 2765 (2005) (urging judicial distinction between “different types” of direct democracy).

<sup>77</sup> Mark Tushnet, *Fear of Voting: Differential Standards of Judicial Review of Direct Legislation*, 1996 ANN. SURV. AM. L. 373, 373–75 (1996).

tural or political concerns—do not support more aggressive judicial review.<sup>78</sup>

A review of the record of state constitutional amendments suggests state courts and even federal courts are extremely reluctant to invalidate or narrow amendments that have garnered majority support. The Supreme Court declined to invalidate state expressions of direct democracy as inconsistent with the republican form of government clause in the U.S. Constitution.<sup>79</sup> On occasion, the Court has struck down certain state constitutional amendments as inconsistent with federal constitutional provisions. For instance, the Supreme Court affirmed the Colorado Supreme Court's invalidation of the anti-gay rights amendment on equal protection grounds.<sup>80</sup> State courts have ruled that constitutional amendments run afoul of other constitutional provisions, including most notably, the procedural single subject rule. On the whole, state courts and even federal courts have hesitated to interfere with "the will of the people" as expressed in state constitutional amendments.<sup>81</sup> The limiting rules suggested by Professors Frickey and Schacter have yet to be

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<sup>78</sup> See *id.* at 391; see Garrett, *supra* note 76, at 31 (noting that a strict textualist approach, such as that espoused by Justice Scalia, may empower interest groups because, unlike legislation, there is usually no effort at accommodation or compromise by the drafters).

<sup>79</sup> See *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912).

<sup>80</sup> See *Evans v. Romer*, 882 P.2d 1335 (Colo. 1994), *aff'd*, 517 U.S. 620 (1996). But see *Equality Foundation v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997) (upholding similar city ordinance).

<sup>81</sup> Kenneth Miller, *The Courts and the Initiative Process*, in WATERS, *supra* note 48, at 459–60. While not distinguishing between constitutional and statutory initiatives, Miller concludes that "courts have given both the initiative process and individual initiatives a large measure of deference." *Id.* He notes that there has been some judicial resistance in Oregon and elsewhere. *Id.* But see Mads Qvortrup, *The Courts and the People: An Essay on Judicial Review of Initiatives*, in THE BATTLE OVER CITIZEN LAWMAKING 197, 198–99 (M. Dane Waters ed., 2001) (drawing on Professor Miller's data, noting that 54% of initiatives in California, Oregon and Colorado were legally challenged in courts in the 1990s, with 55% of those invalidated in whole or in part). Professor Qvortrup notes that initiatives concerning minorities and political speech were more likely to be invalidated than those involving tax or environmental protection issues. *Id.* at 198. For further discussion of the reluctance of courts to intervene, see also MAGELBY, *supra* note 16, at 72 (constitutional initiatives more legally secure than legislative initiatives); K.K. DuVivier, *By Going Wrong All Things Come Right: Using Alternative Initiatives to Improve Citizen Lawmaking*, 63 U. CIN. L. REV. 1185, 1209–10 (1995). For the debate on interpreting state constitutions independent of the Federal Constitution, see generally G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS (1998); James Gardner, *Whose Constitution Is It?: Why Federalism and Constitutional Positivism Don't Mix*, 46 WM. & MARY L. REV. 1245, 1269 (2005) (state judges should continue to consult federal constitutional law under certain circumstances).

adopted by any court.<sup>82</sup> Despite some notable exceptions,<sup>83</sup> courts generally have avoided entertaining challenges to vague or misleading ballot initiatives.<sup>84</sup>

More typical are the decisions in recent Michigan state court cases dealing with constitutional amendments in Michigan. The Michigan courts required the State Board of Canvassers to authorize petitions for the so-called Michigan Civil Rights Initiative despite the fact that this proposed constitutional amendment did not address any of its overlap with existing constitutional provisions and that there were credible, unresolved allegations of fraud in the signature gathering.<sup>85</sup> When the matter was brought to federal court, the district court judge declined to invalidate the petitions despite finding “well-documented acts of fraud and deception that the defendants, as a matter of fact, have not credibly denied.”<sup>86</sup> The district court judge further stated:

[T]he state has demonstrated an almost complete institutional indifference to the credible allegations of voter fraud . . . . If the institutions established by the People of Michigan, including the Michigan Courts, Board of State Canvassers, Secretary of State, Attorney General, and Bureau of Elections, had taken the allegations of

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<sup>82</sup> Michael M. O’Hear, *Statutory Interpretation and Direct Democracy: Lessons from the Drug Treatment Initiatives*, 40 HARV. J. ON LEGIS. 281, 337 (2003) (finding no published opinions by any state court utilizing Professor Frickey’s or Professor Schacter’s interpretive rules for statutory initiatives). For a very helpful general introduction to judicial review of direct democracy, see SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY* 982–1037 (2d ed. 2002).

<sup>83</sup> See, e.g., ELLIS, *supra* note 22, at 149–51 (describing the Oregon Supreme Court’s rewriting of ballot title in *Rooney v. Kulonsk*, 902 P. 2d 1143, 322 Ore. 15 (1995)).

<sup>84</sup> See, e.g., Mihui Pak, *The Counter-Majoritarian Difficulty in Focus: Judicial Review of Initiatives*, 32 COLUM. J. L. & SOC. PROBS. 237, 250 (1999) (courts avoid possibility of abusing judicial discretion in labeling initiatives unconstitutional). Pak particularly criticizes the en banc Ninth Circuit’s approach in *Jones v. Bates*, 127 F.3d 839 (9th Cir. 1997), *rev’d* *Bates v. Jones*, 131 F.3d 843 (9th Cir. 1997) (en banc), *cert. denied*, 522 U.S. 1038 (1998) (en banc panel overturned finding state voters lacked notice and clear understanding of state constitutional amendment imposing lifetime term limit on state legislators, earlier upheld by the California Supreme Court); *Legislature v. Eu*, 54 Cal. 3d 492, 816 P.2d 1309 (1991), *cert. denied*, 503 U.S. 919 (1992).

<sup>85</sup> *Michigan Civil Rights Initiative v. Board of State Canvassers*, 708 N.W.2d 139, 143–47 (Mich. Ct. App. 2005); *Coalition to Defend Affirmative Action v. Board of State Canvassers*, 686 N.W.2d 287, 293–94 (Mich. Ct. App. 2004) (finding no requirement that similar existing constitutional provisions must be published in a petition).

<sup>86</sup> *Operation King’s Dream v. Connerly*, No. 06-12773, 2006 U.S. Dist. LEXIS 61323, at \*5 (D. Mich. Aug. 29, 2006), *appeal dismissed as moot* 2007, No. 06-2144, U.S. App. LEXIS 20550, (6th Cir. Aug. 28, 2007); see Jocelyn Friedrichs Benson, *Election Fraud and the Initiative Process: A Study of the 2006 Michigan Civil Rights Initiative*, 34 FORDHAM URBAN L.J. 889 (2007).

voter fraud seriously, then it is quite possible that this case would not have come to federal court.<sup>87</sup>

In a second example involving a 2004 constitutional amendment purporting to ban same-sex marriage,<sup>88</sup> the state courts declined to clarify the scope of the proposal before the measure was placed on the ballot.<sup>89</sup> The Michigan Court of Appeals ruled that the State Board of Canvassers was required to place the amendment on the ballot, holding the board lacked authority to consider the legality of the proposal and the substantive challenge “ripe for review” until after enactment.<sup>90</sup> In reaching this conclusion, the Court of Appeals noted that two board members:

[E]xpressed concern that the description of the proposal did not reflect the fact that it could be interpreted to prohibit the recognition of existing or future domestic partnerships between a man and a woman or between a same-sex couple, or to prohibit health insurers from providing a plan allowing for benefits to unmarried couples, either opposite sex or same-sex.<sup>91</sup>

Moreover, the Court noted that an assistant attorney general argued that clarifying the likely effects in a ballot summary (including court interpretation) would be “fraught with difficulty for the simple reason that by listing some, you omit others.”<sup>92</sup>

After the same-sex marriage ban passed, the state courts were asked to clarify the amendment’s meaning with respect to the permissibility of public employers offering health benefits to domestic partners in *National Pride at Work v. Governor of Michigan*.<sup>93</sup> The Court of Appeals reversed a lower court ruling holding that Michigan’s constitutional amendment precluded the offering of domestic partner health benefits.<sup>94</sup> The Court noted that it stood alone among those states barring same-sex marriage in finding that it applied to health benefits, but asserted that the wording in Michigan differed from that in other states.<sup>95</sup> Thus, the

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<sup>87</sup> See *Operation King’s Dream*, 2006 U.S. Dist. Lexis 61323, at \*3.

<sup>88</sup> Article 1, section 25 of the Michigan Constitution, as amended in 2004, provides: “To secure and preserve the benefits or marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.” MICH. CONST. art. I, § 25.

<sup>89</sup> *Citizens for Protection of Marriage v. Board of State Canvassers*, 688 N.W.2d 538, 542–43 (Mich. Ct. App. 2004).

<sup>90</sup> *Id.* at 542.

<sup>91</sup> *Id.* at 541.

<sup>92</sup> *Id.*

<sup>93</sup> *National Pride at Work v. Governor of Michigan*, 732 N.W.2d 139 (Mich. Ct. App. 2007).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

Michigan courts declined to require specificity in the wording of the ballot and then adopted a broad construction of the amendment.<sup>96</sup>

These examples illustrate the broader dilemma posed by state constitutional amendments not adequately reviewed, analyzed, or explained before facing the voters. State courts are particularly unlikely to provide meaningful substantive judicial review of constitutional amendments,<sup>97</sup> and federal courts generally do not appear eager to adopt any heightened scrutiny, regardless of the legal commentary.

Although in theory, disgruntled groups could try to overturn adverse administrative<sup>98</sup> or judicial interpretations of amendments through subsequent constitutional initiatives, the costs of such actions will likely discourage most from pursuing this course.<sup>99</sup> Namely, in virtually all states, any constitutional amendment must be ratified through a statewide vote.<sup>100</sup> Thus, unlike statutory proposals, the legislature cannot unilaterally unwind a state constitution provision, even if that provision proves to be sub-optimal.<sup>101</sup> Thus, the aggregate institution must likely depend on the legislature or an interest group to act as a proposer. It must further rely upon some third party to pay the costs of collective action necessary to see a subsequent proposal garner sufficient support.<sup>102</sup> Simply put, if the goal of an institution is to maintain an optimal form,<sup>103</sup> the use of the electoral mechanism to undo a recently adopted constitutional amendment may prove wanting, as some individuals may be unwilling to unwind recently adopted constitutional changes.<sup>104</sup>

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<sup>96</sup> *Id.* For examples of such broad readings in other states, see Pam Belluck & Gretchen Ruethling, *2 Court Rulings Deal Blow to Same-Sex Marriage*, N.Y. TIMES, July 15, 2006, at A8. For an argument against a broad reading of such amendments, see Mark Strasser, *State Marriage Amendments and Overreaching: On Plain Meaning, Good Public Policy and Constitution Limitations*, 25 LAW & INEQ. 59 (2007) (noting a broad reading exposes these provisions to constitutional attack).

<sup>97</sup> See, e.g., Hans A. Linde, *When Initiative Lawmaking Is Not "Republican Government": The Campaign Against Homosexuality*, 72 OR. L. REV. 19, 34 (1993) (noting that an initiated constitutional amendment in Oregon does not require judicial review and comparing that with the legislative process of hearings and review).

<sup>98</sup> For an argument that many state initiatives leave significant discretion to government actors, see ELISABETH R. GERBER ET AL., *STEALING THE INITIATIVE: HOW STATE GOVERNMENT RESPONDS TO DIRECT DEMOCRACY* 109–10 (2001).

<sup>99</sup> See Donovan et al., *supra* note 22, at 101.

<sup>100</sup> As discussed earlier, Delaware reflects a deviation from this trend. See *supra* note 23.

<sup>101</sup> *Id.*

<sup>102</sup> See Donovan et al., *supra* note 22 (describing the initiative industrial complex). Third-party supporters are very likely necessary to enable a given proposal garner majority support. See *id.* at 111–14.

<sup>103</sup> For the idea underlying optimization, see *supra* note 2 and accompanying text.

<sup>104</sup> This concern is related to a concept that social scientists call preference endogeneity. Specifically, voters may, for some period following passage, be unwilling to unwind a recently enacted proposal regardless of its discovered faults. In other words, the treatment effect of taking a collective decision creates a status quo bias in subsequent periods. For a notable



In the sixteen states with the Direct Constitutional Initiative (DCI), where proposals receive no legislative attention and scant attention by other bodies and where the electoral mechanism is unlikely to unwind sub-optimal institutional modifications, it is imperative to look to the initial moment of constitutional modification and ensure that the existing procedures operate to resist the adoption of anachronistic proposals. To motivate the reform of the procedural elements of constitutional direct democracy suggested in Part III.C, Part III.B will briefly highlight some of the neo-institutionalist social science literature on constitutions.<sup>105</sup>

## B. WHY INSTITUTIONS (INCLUDING CONSTITUTIONS) MATTER

Constitutions have been characterized as a form of organization that can be generalized and compared to other types of institutions.<sup>106</sup> This broad conception of institutions as an organizing force has been urged by a variety of scholars.<sup>107</sup> Economist Douglass North classifies institutions as “the humanly devised constraints that structure human interaction.”<sup>108</sup> While significant academic literature is focused upon understanding specific policy choices, the study of institutions is devoted to a consideration

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study of preference endogeneity in the context of politics, see Elisabeth Gerber & John Jackson, *Endogenous Preferences and the Study of Institutions*, 87 AM. POL. SCI. REV. 639 (1993).

<sup>105</sup> For a prior attempt to reform the state institute and referendum process, see *The Challenges of Direct Democracy in a Republic*, ABA Task Force Report (August 1993) (on file with author). The report describes the American institute and referendum process and presents a number of important recommendations, several of which are echoed herein. This report, however was produced at the beginning of the recent surge in the use of direct democracy, in particular the use Direct Constitutional Initiative.

<sup>106</sup> For a summary of the issues surrounding the conceptualization of constitutions as institutions, see Stefan Voigt, *Breaking with the Notion of Social Contract: Constitutions as Based on Spontaneously Arisen Institutions*, 10 CONST. POL. ECON. 283 (1999).

<sup>107</sup> Many different versions of the institutionalist program exist including Historical Institutionalism, Rational Choice Institutionalism and Sociological Institutionalism. For just a small segment of this larger literature, see, e.g., James G. March & Johan P. Olsen, *Institutional Perspectives on Political Institutions*, 9 GOVERNANCE 247 (1996); James G. March & Johan P. Olsen, *The New Institutionalism: Organizational Factors in Political Life*, 78 AMER. POL. SCI. REV. 734 (1984); Kenneth Shepsle, *Studying Institutions: Some Lessons from the Rational Choice Approach*, 1 J. OF THEORETICAL POL. 131 (1989). The “New-Institutionalism” is an approach characterized by social scientists Daniel Diermeier and Keith Krehbiel as “more of a method than a mission.” See Daniel Diermeier & Keith Krehbiel, *Institutionalism as a Methodology*, 15 J. THEO. POL. 123, 124 (2003) (explaining that empirical testing is part of the institutionalist agenda). While in many ways similar, some argue that New Institutionalism is differentiable from New Institutional Economics (NIE). However, all approaches share many similar traits. For some prominent work in NIE, see, e.g., Douglass C. North, *Institutions*, 5 J. ECON. PERSP. 97 (1991); Douglass C. North, *A Transaction Cost Theory of Politics*, 2 J. THEO. POL. 355 (1990); Oliver E. Williamson, *The Institutions of Governance*, 88 AM. ECON. REV. 75 (1998).

<sup>108</sup> Timothy Besley & Anne Case, *Political Institutions and Policy Choices: Evidence from the United States*, 41 J. OF ECON. LIT. 7 (2003) (citing NORTH, *supra* note 2, at 3).

of the higher-order rule environment that governs those choices.<sup>109</sup> Beginning with their classic work on constitutions, Brennan and Buchanan describe the process of constitutional creation as the selection among constraints—constraints that a given community chooses to apply prospectively against itself.<sup>110</sup> Like any byproduct of a political process, constitutions reflect exchanges between competing perspectives and interests. Nevertheless, these supreme documents define the institutional landscape through which the balance of the “game is to be played.”<sup>111</sup>

Constitutions are important precisely because they are semi-permanent institutions robustly designed to restrict the current and future domain of possibilities. They can promote efficiency by decreasing transaction costs, reducing uncertainty, and creating mutual expectations.<sup>112</sup> However, like other institutions designed to promote and sustain collective action, constitutions must balance the efficiency created by their constancy with the need to adapt to changing external circumstances.<sup>113</sup> On the spectrum between these competing goals lies the optimal method for institutional change, one that economist Randall Holcombe described as “clear in theory, but [as] one of the practical challenges of constitutional design.”<sup>114</sup>

Part I of this article documents the increased changes to the higher order rule environment brought about by the Direct Constitutional Initiative [F]. While this increase could represent a genuine need to adapt to an ever changing external environment, this article asserts the absence of any legislative involvement, together with other factors, provides reason to believe that a significant number of these changes are temporally driven sub-optimal modifications to the institutional form.<sup>115</sup> However,

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<sup>109</sup> James Buchanan describes the distinction between Constitutional Economics and traditional Economics as follows:

In one sense all of economics is about choice, and about the varying and complex institutional arrangement within which individuals make choices among alternatives. In ordinary or orthodox economics, no matter how simple or complex, analysis is concentrated on choices made *within* constraints that are, themselves, imposed exogenously to the person or persons charged with making the choice.

Buchanan, *supra* note 2, at 2–3.

<sup>110</sup> See GEOFFREY BRENNAN & JAMES M. BUCHANAN, *THE REASON FOR RULES* 20 (1986).

<sup>111</sup> *Id.* (declaring, “[T]he hallmark of the constitutionalist is the categorical distinction he makes between outcomes generated within defined rules and the rules themselves.”).

<sup>112</sup> ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTIONS OF INSTITUTIONS FOR COLLECTIVE ACTION* 53–54 (1990) (“Rules provide stability of expectations, and efforts to change rules can rapidly reduce that stability.”).

<sup>113</sup> See Holcombe, *supra* note 2; *supra* note 2 and accompanying text.

<sup>114</sup> Holcombe, *supra* note 2, at 326. *But see* Besley & Case, *supra* note 108, at 9 (“The notion of designing an optimal constitution is tinged with hubris.”). This point is well taken; therefore, this article pursues the far more limited but still challenging task of optimizing the method of institutional change.

<sup>115</sup> Of course, one way to increase the legitimacy of these institutional outputs is to increase the deliberation undertaken prior to their ratification. Professor Gardner thoughtfully

rather than focusing upon a normative critique of the individual substantive outputs produced by the existing rules governing state institutional change, the inquiry advanced herein focuses upon remedying the potential procedural deficits in these existing systems. While optimal procedures do not guarantee the production of optimal institutional forms, the presence of normatively attractive procedures does help insulate substantive policy outputs from a variety of common critiques.

In all, this Part is exclusively devoted to the task of identifying the set of existing state practices that, if converged upon, would produce an optimal method of institutional change.<sup>116</sup> Thus, this Part motivates the inquiry by identifying two major as well as several secondary critiques often lodged at constitutional change and direct democracy.<sup>117</sup> Then, it offers a set of mechanisms designed to mitigate these critiques.

To preview, commentators often argue voters face an informational deficit as they make decisions about public policy.<sup>118</sup> In the context of direct democracy, this lack of information causes individuals to select the type of institutional outputs individuals would not otherwise select if they possessed full or proximately complete information about the given policy choice. Next, existing characteristics in the constitutional direct democratic process may breed inefficiency by collapsing the distinction between constitutional and statutory law. Finally, the article confronts certain secondary challenges, including the claim constitutional direct democracy does not advance optimal public policy and instead has been co-opted and used to generate turnout for candidate elections.

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argues, “[T]he laws and jurisprudential doctrines structuring American election campaigns are built around a very different assumption: that the purpose of campaigns is primarily to tabulate exogenous voter preferences.” See James A. Gardner, *Deliberation or Tabulation? The Self-Undermining Constitutional Architecture of Election Campaigns*, 54 BUFFALO L. REV. 1413, 1481 (2007). While the thrust of the argument primarily focuses on candidate elections, much of his argument also properly characterizes the current state of initiative and referenda campaigns. *Id.*

<sup>116</sup> While the article argues significant convergence is advisable, it also recognizes that complete convergence is neither practical nor necessarily desirable. For example, Professor March argues that institutions must balance search for new, innovate practices with the need to converge upon the best current institutional practices. Their analysis supports the notion that complete convergence actually might be globally suboptimal. See March, *supra* note 2; see also *infra* Part IV. Other arguments also counsel against complete convergence. Professor Tarr, for example, has noted how state constitutions may memorialize desirable elements of local culture. See TARR, *supra* note 81.

<sup>117</sup> One important concern not explicitly addressed herein is the problem of preference intensity. Namely, direct democratic elections unlike their legislative counterparts fail to reveal how voters trade off various policies. A number of leading scholars confront this question in their work. See Lynn Baker, *Preferences, Priorities and Plebiscites*, 13 J. CONTEMP. LEGAL ISSUES 317 (2004); Sherman Clark, *A Populist Critique of Direct Democracy*, 112 HARV. L. REV. 434 (1998).

<sup>118</sup> See *infra* note 121 citing some examples of such commentary.

C. CRITIQUES AND SOLUTIONS TO THE SHORTCOMINGS OF  
CONSTITUTIONAL DIRECT DEMOCRACY

1. *Closing the Information Deficit—and Solving the Democratic  
Dilemma?*

Democratic political systems are built upon the notion of delegation.<sup>119</sup> Citizens delegate responsibility to politicians to exercise authority on their behalf.<sup>120</sup> Voters act as their overseers by casting decisions regarding the retrospective and prospective performance of these elected officials.<sup>121</sup> Due to a significant line of survey research demonstrating widespread voter ignorance,<sup>122</sup> many scholars express concern regarding the effectiveness of this candidate selection process as it relies heavily upon voters to make informed decisions.<sup>123</sup> A shift of inquiry from candidate selection toward a direct democratic process offers little evidence that citizens possess the sufficient level of substantive information necessary to make a reasoned choice.<sup>124</sup> Thus, succinctly stated, there is significant reason for concern regarding the health of democratic institutions when “the people who are called upon to make reasoned choices may not be capable of doing so.”<sup>125</sup>

In an effort to rescue democratic theory, political scientists Arthur Lupia and Mathew McCubbins describe the conditions under which individuals with little substantive information can participate as if informed.<sup>126</sup> Attempting to solve *The Democratic Dilemma*, they describe how voters can interpret signals and use heuristics<sup>127</sup> to obtain proximate

<sup>119</sup> See *supra* note 22 discussing the delegation and the principal and agent framework.

<sup>120</sup> ARTHUR LUPIA & MATHEW MCCUBBINS, *THE DEMOCRATIC DILEMMA* 79 (1998).

<sup>121</sup> See MORRIS P. FIORINA, *RETROSPECTIVE VOTING IN AMERICAN NATIONAL ELECTIONS* 3–62 (1981); G. BINGHAM POWELL, *ELECTIONS AS INSTRUMENTS OF DEMOCRACY: MAJORITARIAN AND PROPORTIONAL VISIONS* 7–10 (2000) (arguing majoritarian political systems embrace retrospective voting where voters reward or punish politicians for prior behavior).

<sup>122</sup> LUPIA & MCCUBBINS, *supra* note 120, at 17 (citing Michael X. Delli Carpini & Scott Keeter, *Stability and Change in the United States Public Knowledge of Politics*, 55 *PUB. OPIN. Q.* 583 (1991)); MICHAEL X. DELLI CARPINI & SCOTT KEETER, *WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS* (1996); JOSEPH SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 262 (1942); Shanto Iyengar, *Television News and Citizens' Explanation of National Affairs*, 81 *AMER. POL. SCI. REV.* 815, 816 (1987).

<sup>123</sup> LUPIA & MCCUBBINS, *supra* note 120, at 1.

<sup>124</sup> Arthur Lupia, *Shortcuts Versus Encyclopedias: Information and Voting Behavior in California Insurance Reform Elections*, 88 *AMER. POL. SCI. REV.* 63, 63 (1994) (citing CRONIN, *supra* note 19).

<sup>125</sup> LUPIA & MCCUBBINS, *supra* note 120, at 1.

<sup>126</sup> *Id.*

<sup>127</sup> A heuristic is a simple, easy “rule of thumb” that individuals use to make decisions. Such rules typically develop through an adaptive learning process. Consideration of heuristics is at odds with the set of pure rational choice theories that assume individuals act with complete and perfect information. Notable early work on heuristics was undertaken by Amos Tversky and Daniel Kahneman. This work ultimately earned Kahneman the 2002 Nobel Prize.

information and guide their decision making process.<sup>128</sup> Among their host of informative suggestions, they argue institutions should contain signaling devices to help voters acquire useful substitutes for the substantive knowledge they lack.<sup>129</sup> Specifically, they encourage institutions to clarify other people's interests, impose penalties for lying, introduce the threat of verification, or require costly effort.<sup>130</sup>

It is to this end that this article applies their approach to constitutional direct democracy.<sup>131</sup> Namely, institutions should both signal participants of their interests and, in the case of constitutional direct democracy, highlight for voters that they are being asked to change the state's highest level of law.<sup>132</sup> The following reforms would improve the information environment so that voters can obtain the proximate data necessary to ensure they vote consistent with their individual interests.<sup>133</sup>

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See Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124 (1974). For an example of their later work on prospect theory, see Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decisions Under Risk*, 47 ECONOMETRICA 313 (1979). Consideration of the role of heuristics in decision formation has now entered mainstream social science through such subfields as behavioral economics and political psychology. Recent work in the legal literature also embraces these social sciences findings. See, e.g., BEHAVIORAL LAW & ECONOMICS (Cass Sunstein ed., 2000); Kang, *supra* note 51; Russel Korobkin & Thomas Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051 (2000).

<sup>128</sup> LUPIA & MCCUBBINS, *supra* note 120, at 5–8. To describe the intellectual lineage of their work, the authors cite prominent work in several subfields of game theory including games of incomplete information, signaling games and strategic communication models. For games of incomplete information, see John Harsanyi, *Games with Incomplete Information Played by 'Bayesian' Players I: The Basic Model*, 14 MGMT. SCI. 159 (1968). For signaling games, see JEFFREY S. BANKS, *SIGNALING GAMES IN POLITICAL SCIENCE* (1991); Richard McKelvey & Peter Ordeshook, *Information, Electoral Equilibria and the Democratic Ideal*, 48 J. OF POL. 909 (1986). For examples of strategic communication cited by the authors, see RANDY CALVERT, *MODELS OF IMPERFECT INFORMATION IN POLITICS* (1986); Joseph Farrell & Robert Gibbons, *Cheap Talk with Two Audiences*, 79 AMER. ECON. REV. 1214 (1989).

<sup>129</sup> LUPIA & MCCUBBINS, *supra* note 120, at 206; see also PHILIP L. DUBOIS & FLOYD FEENEY, *LAWMAKING BY INITIATIVE: ISSUES, OPTIONS AND COMPARISONS* 118–20 (1998) (emphasizing how more accurate voting follows when voters are provided with a clear description of the impact of a “yes” vote).

<sup>130</sup> LUPIA & MCCUBBINS, *supra* note 120, at 205–27 (“By clarifying other people’s interests, imposing penalties for lying, introducing the threat of verification, or requiring costly effort, institutions enable voters, legislators, and jurors to make more accurate predictions about the consequences of their actions. Our examination of modern democratic institutions reveals some of the ways in which existing institutions do (or do not) help democratic principals mitigate the democratic dilemma.”).

<sup>131</sup> In an earlier work, Lupia considered a version of the model in the more general context of direct initiatives. See generally Lupia, *supra* note 124. However, this did not specifically focus upon the Direct Constitutional Initiative.

<sup>132</sup> This argument is consistent with the framework offered by Professors Lupia and McCubbins. See generally LUPIA & MCCUBBINS, *supra* note 120.

<sup>133</sup> This is often termed as voting “competently.” See, e.g., Elizabeth Garrett, *The Law and Economics of “Informed Voter” Ballot Notions*, 85 VA. L. REV. 1533, 1534 (1999) (citing Elisabeth Gerber & Arthur Lupia, *Voter Competence in Direct Legislation Elections*, in CITIZEN COMPETENCY & DEMOCRATIC INSTITUTIONS 147 (Stephen Elkins & Korl Soltan eds.,

a. The Production of the Circulation Ballot Title and Summary by State Officials

As identified in Part II, some jurisdictions allow direct democratic proposers to play substantial roles in crafting of the circulation title and summary.<sup>134</sup> In fact, a significant number of states even provide for proposer involvement preparing language for the final ballot.<sup>135</sup> Although the actual empirical implications have not been fully theorized, there is reason for concern because the proposer of a given change has an incentive to manipulate the language of the ballot and introduce noise into the electoral marketplace.<sup>136</sup> For instance, in the past electoral cycle, a federal district court found systematic voter fraud when signature gatherers for the Michigan Civil Rights Initiative (MCRI) were charged with fraudulently telling voters they were signing a petition supporting affirmative action.<sup>137</sup> This ability to mislead signatories is, in part, a function of the noisy environment that is created in proposer involvement in crafting of the circulation title and summary.

Noisy signals persist beyond the signature gathering process, infecting the entire ratification process. Specifically, the noisy signals can cause confusion leading individuals to vote in a manner inconsistent with their genuine interests or to abstain from the matter altogether for fear of

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1999)) (identifying voters as competent “if they cast the same votes they would have cast had they possessed all available knowledge about the policy consequences of their decision.”). For an empirical study, see, e.g., Richard Lau & David Redlawsk, *Voting Correctly*, 91 AMER. POL. SCI. REV. 585 (1997) (finding most voters cast correct votes—the types of votes they would have cast if they possessed complete information).

<sup>134</sup> See INITIATIVE & REFERENDUM INST. AT UNIV. S. CAL., COMPARISON OF STATEWIDE INITIATIVE PROCESSES, <http://iandrinstitute.org/New%20IRI%20Website%20Info/Drop%20Down%20Boxes/Requirements/A%20Comparison%20of%20Statewide%20I&R%20Processes.pdf> [hereinafter COMPARISON OF STATEWIDE INITIATIVE PROCESSES] (while some states provide for review of the circulation materials by state officials several other states including Arizona, Florida, Michigan, Nebraska and Oklahoma allow proposers to write the circulation materials).

<sup>135</sup> See *id.* (states include Arizona, Arkansas, Florida, Illinois, Ohio and Oklahoma).

<sup>136</sup> See Richard Lau & David Redlawsk, *Advantages and Disadvantages of Cognitive Heuristics in Political Decision Making*, 45 AMER. J. POL. SCI. 951 (2001) (the proposers may select the type of noisy signal that systematically favors passage.); Figure 1.6 *supra*; sources cited *supra* note 38. The 2006 election cycle witnessed a number of confusing ballot measures. Other jurisdictions grappled with the confusion brought about by “counter-proposals.” For example, Arizona voters were faced by two ballot measures related to smoking. See INITIATIVE & REFERENDUM INST. AT UNIV. S. CAL., BALLOT WATCH: FOCUS ON TOBACCO, <http://law.usc.edu/academics/assets/docs/BW2006-4Tobacco.pdf>. Ohio featured a similar set of smoking related proposals. *Id.* In both instances, the measures, although similarly titled, called upon voters to consider largely dissimilar measures. *Id.*

<sup>137</sup> See *Operation King’s Dream v. Connerly*, 2006 U.S. Dist. 06-12773, at \*29 (E.D. Mich. 2006) (challenges surrounded Michigan’s smoking measures and in addition, an Anti-Affirmative Action measure, called the Michigan Civil Rights Initiative); see also Benson, *supra* note 86 (discussing how litigants argued that the title and summary were intentionally drafted to mislead voters).

voting erroneously. The framework offered by Lupia and McCubbins cautions against allowing the proposers to have a role in title and summary matters.<sup>138</sup> Namely, these devices are perfectly designed for use as a heuristic.<sup>139</sup> Although state officials do not always produce these materials, they are still likely to be relied upon by voters. Applying the Lupia and McCubbins discourse, we see that voters may believe that the signal is fully credible because state officials typically face “penalties” for lying.<sup>140</sup> However, despite appearances, state officials are not the unfettered authors of these signals. Yet, voters’ may be justifiably ignorant of this fact and unwittingly assign the title and summary excessive weight in their decision calculus.

To remedy this potential problem, all states should charge state officials with the unassisted task of crafting the circulation and the final ballot title and summary. While many states already have this institutional feature,<sup>141</sup> those who do not could improve their signaling environment by using this practice.<sup>142</sup> To ensure the designated official produces a relatively neutral description of the proposal, states should provide for expedited review of those conflicts related to the title and summary of a constitutional initiative. In this review process, the decision of the officials should be allotted the type of deference typically afforded to administrative agency officials.<sup>143</sup> While the use of these administrative procedures does not ensure the end of noise free signaling, such a reform could reduce claims that noise, rather than the true voter preferences, produce the outputs of constitutional direct democracy.

#### b. A Need for Support of a Constitutional Change in Two Consecutive Elections

Additional institutional signaling mechanisms would also assist in reducing noise. For example, there should be concern in instances when signaling mechanisms are called upon to change their state constitutions. It is quite likely many voters are unaware of the distinction between statutory and constitutional law. Alternatively, even if they are aware, they could fail to receive a signal in a discrete case. Even in jurisdictions with

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<sup>138</sup> See generally LUPIA & MCCUBBINS, *supra* note 120.

<sup>139</sup> See *supra* note 127 (discussing the role of heuristics in its role in law and economics).

<sup>140</sup> See LUPIA & MCCUBBINS, *supra* note 120, at 205.

<sup>141</sup> See *supra* note 134 (complete listing).

<sup>142</sup> *Id.*

<sup>143</sup> See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (Justice Stevens crafted the *Chevron* “two-step” test. The second step of this test is particularly applicable in titles and summaries. In step two, a reviewing court determines whether the agency’s interpretations of a statute are reasonable or permissible. If the interpretation of the statute is reasonable, then the court grants the agency deference).

clear ballot language, voters may not recognize they are changing their state's highest level of law.

The institutional rules displayed by Nevada may offer a possible solution to this problem.<sup>144</sup> Nevada law provides a change to its constitution must be ratified by the majorities in two consecutive general elections.<sup>145</sup> While this institutional choice mitigates some problems and exacerbates others,<sup>146</sup> it provides voters with a valuable signal. First, regardless of whether the voter understands the distinction between the levels of law, this double majority requirement helps to highlight that the matter at issue is a significant change. Furthermore, the use of two consecutive elections for constitutional changes may allow voters the necessary time to obtain needed information and sort signals. Specifically, many criticize direct democratic elections for a lack of deliberation.<sup>147</sup> The consideration of a given constitutional change in two consecutive elections would extend the time for citizens to deliberate, potentially leading to more reasoned considerations of the matter at issue.

c. Marginal Improvements in Disclosure?

A number of commentators argue that substantial financial disclosure in direct democratic elections could assist voters in their decision making.<sup>148</sup> This approach seems sensible because information is the commodity that many voters lack when casting decisions.<sup>149</sup> Specifically, if voters could obtain substantive or proximate knowledge of the financial support that is provided to ballot measures, they may be able to use that information to determine whether they want to support a given proposal.

The Supreme Court's current campaign finance jurisprudence, however, has undercut the ability of government in direct democratic elections to provide information to voters through low cost, accessible

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<sup>144</sup> See ELLIS, *supra* note 22, 134–37 (providing a more elaborate discussion of Nevada's successive majority requirement).

<sup>145</sup> NEV. CONST. art. IXX; see *supra* Table 2.3.

<sup>146</sup> This would certainly help maintain the distinction between constitutional and statutory law. However, it might also serve to increase the incentive to use the constitutional process as a candidate turnout device.

<sup>147</sup> See LUPA & McCUBBINS, *supra* note 120, at 226. See generally 1 JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION* (Thomas McCarthy trans., 1984) (for more on the deliberation within democracy and perspective on the ideal speech situation).

<sup>148</sup> See Kang, *supra* note 51, at 1166–69; see also BRADLEY SMITH, *UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM* (2001) (providing a strong critique of disclosure in campaign finance); Elizabeth Garrett, *The William J. Brennan Lecture in Constitutional Law: The Future of Campaign Finance Law in the Courts and in Congress*, 27 OKLA. CITY U. L. REV. 665, 669–75 (2003).

<sup>149</sup> See *supra* note 122 and accompanying text (discussing extensive survey research displaying widespread voter ignorance).



means.<sup>150</sup> For example, Professor Kang notes, “Existing campaign finance regulations in direct democracy have been inadequate for providing voters with helpful heuristic cues.”<sup>151</sup> To remedy the existing defects in voter competence, Professor Kang advocates reconsideration of the constitutional framework in favor of a “disclosure plus” approach.<sup>152</sup>

While the ultimate reconsideration of campaign finance jurisprudence may or may not occur, within existing regulations there are existing state practices that can still assist voters. For example, several states distribute a voters’ guide to its citizens.<sup>153</sup> The booklet contains information with candidate biographical information and information on ballot measures. While this article asserts that voters’ guides should be provided by all jurisdictions, it recognizes that these guides are quite lengthy and may still leave many voters unable to obtain necessary information to cast their vote.<sup>154</sup> Despite limitations, marginal changes to the format of the voters’ guide could improve the information environment. In instances where voters are called upon to amend the state’s constitution, state officials should place such matters at the beginning of their election guides. At the same time, it should place any statutory proposals at the end of the guide. By placing constitutional amendments before and statutory proposals after candidate races, voters should receive an explicit signal—one that assists them in differentiating the complicated landscape.

#### d. Upfront Judicial Review—Provides Clear Information on a Vote’s Impact

A stringent form of upfront judicial review might also improve the informational environment. As noted earlier, judicial officials are typically reluctant to oppose a measure that has garnered majority support, particularly when it concerns a change to the state’s highest level of

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<sup>150</sup> See Kang, *supra* note 51, at 1169–76 (discussing cases like *First National Bank of Boston v. Bellotti*, 443 U.S. 765 (1978), in which, the Supreme Court, citing an absence of corruption, permitted less regulation of issue elections than of candidate elections).

<sup>151</sup> See Kang, *supra* note 51, at 1165.

<sup>152</sup> *Id.*

<sup>153</sup> For example, Oregon produces an extensive guide. See Voters’ Guide for November 7, 2006 General Election, <http://www.sos.state.or.us/elections/nov72006/guide/cover.html> (last visited Feb. 23, 2008). This guide contains candidate biographical information and a statement prepared by the candidate supporting his or her candidacy. See *id.* In addition, the Oregon guide provides information on ballot measures including the text of the measure, an explanatory statement, a description of the impact of a yes or no vote as well as arguments in favor and against. *Id.*; see also California Presidential Primary: Official Voter Information Guide, <http://voterguide.sos.ca.gov/> (last visited Feb. 23, 2008).

<sup>154</sup> See Kang, *supra* note 51, at 1167 (citing J. FRED SILVA, THE CALIFORNIA INITIATIVE PROCESS: BACKGROUND AND PERSPECTIVE-RESOURCE MATERIAL FOR THE SPEAKER’S COMMISSION ON THE CALIFORNIA INITIATIVE PROCESS 31 (2000)).

law.<sup>155</sup> Given that the reluctance to oppose majority-supported judicial action is deeply embedded and unlikely to abate, this article proposes judicial officers involve themselves prospectively in the constitutional direct democratic process.

Florida, a state with an above-average number of direct constitutional initiatives, provides for pre-review of constitutional initiatives by the Florida Supreme Court prior to their placement on the electoral ballot.<sup>156</sup> Other states also embrace some variant of this technique.<sup>157</sup> However, this pre-review is typically cursory and used to determine whether the proposal clearly violates the U.S. Constitution. The approach advocated herein, however, goes further, calling upon each state to allow its highest court to provide a full advisory opinion of how a given constitutional change would impact existing state-level constitutional and statutory provisions. Such information might genuinely assist voters. To maximize accessibility, an executive summary of this advisory opinion could be included in the voters' guide.

Like the other proposals, the use of upfront judicial review does not ensure that voters will receive the necessary signals. Yet, this feature is attractive because it helps mitigate a degree of uncertainty by providing all players involved in the enterprise some understanding of how the judiciary will interpret a given measure. As this is a laborious task, for the purposes of judicial economy, this article simply advocates interposing this form of review in the immensely important context of the direct modification of state constitutions. Taken together with the other aforementioned changes, this reform would improve the probability that any adopted constitutional changes reflect genuine and robust voter preferences.

## 2. *Strengthening the Distinction Between Constitutional and Statutory Law*

As previously described, constitutions impose restrictions on the immediate choices available to a political system's actors. They memorialize higher order rules and operate to resist change driven by temporal or anachronistic conditions. As Elinor Ostrom explains, constitutions are designed to create mutual expectations.<sup>158</sup> Such mutual expectations cannot be legitimately sustained unless the marginal effort necessary to change statutory law is differentiated from the level necessary for constitutional change.

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<sup>155</sup> See *supra* Part III.A.

<sup>156</sup> See *supra* note 48 and accompanying text.

<sup>157</sup> See COMPARISON OF STATEWIDE INITIATIVE PROCESSES, *supra* note 134.

<sup>158</sup> See Ostrom, *supra* note 112.

Current methods for institutional modification displayed in a number of states do very little to distinguish between constitutional and statutory modification. As Part II of this article demonstrates, although there is substantial interstate variance in the nature of direct democratic processes, within most states there are very few differences between processes. In virtually every jurisdiction featuring multiple direct processes, it is almost as easy to modify the constitution as it is to enact statutory law. The only significant difference is the number of required signatures.<sup>159</sup> A few modifications to the institutional rules, however, would help distinguish between the methods for modifying mere statutory law and methods for modifying a state's constitution.

a. Differentiate the Signature Requirements for Constitutional Change

Opponents of direct democracy have long advocated increasing signature requirements.<sup>160</sup> This is not surprising because an increase in the signature requirement increases the cost of a proposal, presumably limiting the total number of direct democratic offerings.<sup>161</sup> Restricting the general supply of direct democratic proposals is outside the scope of this article. Instead, this article advocates creating a demarcation in signature thresholds so that only robustly supported changes to the constitution enter the electoral marketplace.

As previously discussed, there is evidence that recent constitutional changes are driven in part by a lax incentive environment—one that imposes little differentiation in cost between statutory and constitutional proposals. It may be tempting to believe that any defective reforms will be modified once they are discovered. Under current rules in many jurisdictions, there is only a short period following a statutory proposal's passage during which it may not be rescinded by the legislature.<sup>162</sup> Thus, in many instances, if a given statutory measure proves ineffective, it can be removed or modified through the basic lawmaking process. The same is

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<sup>159</sup> For a comparison of signature thresholds, see *supra* Table 2.2.

<sup>160</sup> See Cody Hoesly, *Reforming Direct Democracy: Lessons from Oregon*, 93 CAL. L. REV. 1191, 1231 (2005) ("[M]any reform proposals seek to make it more difficult to place an initiative on the ballot. The most common of these is to raise the number of signatures petitioners must gather before they can place their initiative on the ballot."); see also DUBOIS & FEENEY, *supra* note 129, at 74–75.

<sup>161</sup> See Hoesly, *supra* note 160, at 1230–32 (raising the possibility that increased signatures may dissuade proposers while simultaneously acknowledging it might not induce the desired outcome). It is worth noting that increasing the signature thresholds could have unintended consequences. For example, courts, already reticent to interpose themselves in Constitutional Direct Democracy, might be even more deferential to proposals that have obtained the heightened signature thresholds.

<sup>162</sup> For a basic listing of these rules, see THE INITIATIVE AND REFERENDUM ALMANAC (2003).

not true of state constitutional changes because in virtually all instances they must be ratified by voters.

It is this difference that may lock in an inefficient constitutional arrangement. To avoid this outcome, existing rules should be modified to produce clearly distinguishable processes that embrace constitutional changes only when necessary. Thus, to reduce lock in, and help create mutual expectations, states should differentiate their signature thresholds. As Table 2.2 demonstrates, several states already embrace this practice.<sup>163</sup> Oklahoma, for example, provides a model for other states to consider. It requires that the number of signatures equal at least 15% of the total votes cast in the most recent gubernatorial election.<sup>164</sup> This is nearly double the 8% required to propose a statutory change.<sup>165</sup> While there is no guarantee that optimal constitutional reform will result, such differentiation should increase the probability that proposers who choose the constitutional vehicle do so for policy reasons. Thus, other jurisdictions should consider following Oklahoma's lead by requiring significant and clearly distinctive signature thresholds.

#### b. Supermajority Requirement for Constitutional Change

Like the signature requirements, a number of the opponents of direct democracy often also support increasing the ratification thresholds. While a number of states feature secondary requirements that target undervotes, virtually every state requires mere majority support to ratify a constitutional change. Several scholars of constitutional political economy disagree with the use of majoritarian ratification thresholds. For example, in his work on constitutional design Professor Cass Sunstein argues that "[d]eliberative democracies do not respond mechanically to what a majority currently thinks. They do not take snapshots of public opinion."<sup>166</sup> Buchanan and Tullock go further by emphasizing that while there may be an intrinsic appeal of majority rule, it is "a highly imperfect mechanism for securing distributive justice."<sup>167</sup> While these authors do not reach substantive or procedural conclusions, they do agree that pure majority rule is not the only calling of democratic politics. Instead, reason and restraint memorialized in sticky constitutional institutions are also an important motivating dynamic.

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<sup>163</sup> See *supra* Table 2.2. Others, most notably Colorado, do not. Colorado requires the same number of signatures regardless of the level of law at issue.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> CASS R. SUNSTEIN, *DESIGNING DEMOCRACY* 239 (2001).

<sup>167</sup> See BUCHANAN & TULLOCK, *supra* note 2, at 97–116 (focusing primarily on fiscal questions); see also John O. McGinnis & Michael B. Rappaport, *Supermajority Rules as a Constitutional Solution*, 40 WM. & MARY L. REV. 365 (1999) (considering supermajority rules in the context of the U.S. Constitution).

These scholars would likely support action taken by voters in Florida, who in 2006 voted to impose a supermajority requirement upon any prospective constitutional changes.<sup>168</sup> While this change does not ensure the provision of optimal public policy, a supermajority requirement would, like the signature thresholds, help both filter out some range of anachronistically offered constitutional proposals and differentiate between levels of rules in the legal hierarchy. Specifically, it might induce some actors seeking policy change to select the statutory rather than the constitutional mechanism. States should follow Florida and consider increasing their ratification thresholds for constitutional changes. In particular, they should impose supermajority requirements upon those proposals that circumvent the legislature (i.e., the direct constitutional initiative).

c. Require Support in Two Consecutive Elections for Constitutional Change

In addition to the signaling benefits previously discussed, the requirement of majority support in two consecutive elections would help maintain a clear demarcation between statutory and constitutional changes. Specifically, as noted earlier, given the relatively negligible differences between the statutory and constitutional modification processes and the benefits to choosing constitutional change, the aggregate increased use of the direct constitutional initiative might be driven as much by the existing incentive structure as a genuine need to change the institutional form.

Nevada's double ratification practice would help sort the supply function for constitutional offerings.<sup>169</sup> Double ratification would increase the marginal cost of a constitutional proposal helping ensure the set of constitutional proposals that reach the ballot genuinely necessitate their constitutional form. At the same time, the double-ratification requirement is not likely to eliminate the possibility of citizen driven constitutional change.<sup>170</sup> Yet, taken together with the differentiation in signature thresholds and the supermajority requirement, it should demar-

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<sup>168</sup> In fact, 57.8% choose to impose the 60% threshold. See Florida Dep't of State, Elections Results, *supra* note 60. This structure in essence creates a one-way ratchet as it now a supermajority is required to reinstitute majority rule. Such a change would be impossible in Oregon because voters, through the 1998 Measure 63, imposed a requirement that "[a]ny measure that includes any proposed requirement for more than a majority of votes cast by the electorate to approve any change in law or government action shall become effective only if approved by at least the same percentage of voters specified in the proposed voting requirement." OR. CONST. art. II, § 23.

<sup>169</sup> NEV. CONST. art. 19, § 2.

<sup>170</sup> According to our data, under the double ratification requirement, Nevada has embraced a non-trivial number of modifications to its constitution in the past decades.

cate levels of rules and help prevent states from embracing transitory modifications.

### 3. *Secondary Critiques of Constitutional Direct Democracy*

#### a. Constitutional Direct Democracy as a Candidate Turnout Device

Recent popular accounts have posited that the sponsors of a number of direct democratic proposals are far less interested in advancing optimal public policy than using the process to increase voter turnout in the simultaneous candidate election.<sup>171</sup> Namely, a set of marginal voters are thought to be induced to the polls by a given ballot measure and once present, cast a vote for a particular set of preferred candidates.<sup>172</sup> Thus, political parties or third party interest groups are believed to select proposals that disproportionately draw favorable voters.<sup>173</sup> While the theory appears sound, social scientists, who empirically consider this matter, reach differing conclusions regarding the extent of this effect. For example, early work finds no statistically significant relationship and thus argues the candidate races alone drive the extent of overall voter turnout.<sup>174</sup> Conversely, more recent work finds a conditional relationship between turnout and ballot measures.<sup>175</sup> Namely, the presence of a ballot measure may induce turnout during midterm elections, where the candidate races are less attractive and do less to bring voters to the polls.

Actors who strategically seek to use direct democracy, however, may be less interested in the magnitude of impact than the specific candidate races at issue. Specifically, they may be primarily interested in affecting the presidential or other semi-periodic elections. Thus, while this ongoing empirical debate does not provide complete clarity as to the appropriate remedy to fashion, it does partially inform the policy solution.

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<sup>171</sup> See, e.g., Sheryl Gay Stolberg, *G.O.P. Moves Fast to Reignite Issue of Gay Marriage*, N.Y. TIMES, Oct. 27, 2006, at A6.

<sup>172</sup> See, e.g., Walter Shapiro, *Ohio Churches Hope Marriage Ban Prods Voters to Polls*, USA TODAY, Sept. 27, 2004, at 10A.

<sup>173</sup> See Stolberg, *supra* note 171.

<sup>174</sup> While journalistic accounts often assert this relationship, there is significant debate in the social science literature regarding the magnitude of effect that direct democracy imposes upon voter turnout. See David Everson, *The Effects of Initiatives on Voter Turnout: A Comparative State Analysis*, 34 W. POL. Q. 415, 424–25 (1981) (finding no statistically discernible effect); Franklin Gilliam, *Influences on Voter Turnout for U.S. House Elections in Non-Presidential Years*, 10 LEGIS. STUD. Q. 339, 344–47 (1985) (finding the presence of a tax referendum on the ballot did not have a discernable impact on voter turnout).

<sup>175</sup> The methodology employed in early studies has been challenged by recent work. See, e.g., Mark Smith, *The Contingent Effects of Ballot Initiatives and Candidate Races on Turnout*, 45 AM. J. POL. SCI. 700, 703–05 (2001) (re-specifying the original model and finding a relationship between high salience ballot measures and voter turnout in candidate races).

As has been noted throughout, the primary focus of this article is the potential embrace of temporally driven but ultimately sub-optimal constitutional changes. In response to this concern, as well as the narrow concern of turnout driven strategic use of the Direct Constitutional Initiative, states could combine Nevada's double ratification practice together with the practice of Tennessee, which requires all constitutional changes to be ratified in the midterm elections.<sup>176</sup> This may reduce part of the strategic incentive to use the direct democracy processes. Specifically, even if the impact upon the midterm election is greater, the inability to effect the presidential elections until the second of the double ratification votes may induce an interest group or political party to consider a different approach, other than the Direct Constitutional Initiative, in order to increase voter turnout.

b. Information in the Crowded Market of Direct Democratic Offerings

The past years' aggregate increase in the use of direct democratic processes has created a crowded market for direct democratic offerings. For example, the 2000 general election cycle saw voters reflect upon more than twenty-five ballot proposals in the state of Oregon.<sup>177</sup> California has also been a leader in direct democratic offerings; in 2004, the ballot featured more than fifteen total offerings.<sup>178</sup>

Interspersed among these proposals were a significant number of constitutional changes. For all of the reasons previously discussed, constitutional offerings, in particular those offered without first passing through any legislative filter, should be of primary concern. However, the large ticket of total offerings threatens to obscure the significance of these measures.

This article describes a number of mechanisms that increase the cost to proposing a constitutional change—presumably limiting the total number of constitutional offerings. Of course, another way to limit the number of constitutional changes is merely to restrict the number of constitutional changes.<sup>179</sup> However, this is likely to prove unworkable. The

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<sup>176</sup> TENN. CONST. art. XI, § 3 (“[If] such proposed amendment or amendments shall be agreed to by two-thirds of all the members elected to each house, then it shall be the duty of the General Assembly to submit such proposed amendment or amendments to the people at the next general election in which a governor is to be chosen.” (emphasis added)).

<sup>177</sup> See Oregon Blue Book: Initiative, Referendum and Recall: 2000–2006, <http://bluebook.state.or.us/state/elections/elections22a.htm> (last visited Feb. 16, 2008).

<sup>178</sup> See Cal. Secretary of State, 2004 Presidential General Election, Statewide Measures Submitted to a Vote of Voters, [http://www.sos.ca.gov/elections/sov/2004\\_general/contents.htm](http://www.sos.ca.gov/elections/sov/2004_general/contents.htm) (last visited Feb. 16, 2008).

<sup>179</sup> For a description of such existing limitations, see WATERS, *supra* note 53, at 20. See also Benjamin, *supra* note 11, at 183 (offering a list of states with various limits upon the number of amendments per session).

wide number of ballot measures voters' face is derived from multiple proposers and methods. Limiting the number of ballot offerings to more manageable numbers would require a widespread limitation reaching all forms of direct democracy.

As discussed throughout this article, low cost information is the commodity that voters may need. This is particularly true of issue elections where financial information is difficult to obtain and proposals do not come attached with party labels.<sup>180</sup> In such a clustered ballot, it is difficult for even the most diligent and motivated individuals to obtain the proximate, let alone substantive knowledge, necessary to cast a vote consistent with their interests.

Institutions can help provide low cost informational signals to voters and as such increase the legitimacy of the collective choice obtained through a direct democratic process. Instead of imposing per se restrictions upon the total number of direct democratic offerings, states could reorder their electoral ballots in an effort to signal voters of constitutional changes.<sup>181</sup> Significant work from the social sciences contends that ballot placement may have an impact on political outcomes.<sup>182</sup> Capturing upon these findings, states should consider placing changes to their constitutions directly after federal elections but before any state-level candidate races. Much like the proposal to reorder the voters' guides discussed earlier,<sup>183</sup> statutory proposals could then follow the state-level candidate races. This demarcation would highlight the supreme importance of the matter at issue and help overcome some of the noise associated with the crowded market for direct democratic offerings.

#### CONCLUSION: FEDERALISM, BEST PRACTICES, AND CONVERGENCE: TOWARD AN OPTIMAL MECHANISM FOR INSTITUTIONAL MODIFICATION

The American federal bargain produces significant state autonomy over certain policy domains. Each state is fully empowered to make different choices regarding both its substantive policy outputs and the out-

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<sup>180</sup> See Kang, *supra* note 50, at 1149–51.

<sup>181</sup> Some states already engage in a mild version of this practice. Consider Arizona which attaches differing numbers (300s, 200s, 100s) to proposals in an effort to signal voters of the nature of the change in question. Such numbering is required by law. See ARIZ. REV. STAT. ANN. § 19-125(B) (2002).

<sup>182</sup> Although typically concerned with the placement of individuals in candidate races, the literature on ballot order effects provides a lesson applicable to issue races. Compare Jonathan Koppell & Jennifer Steen, *The Effects of Ballot Position on Election Outcomes*, 66 J. POL. 267, 268 (2004) (providing a good summary of the candidate-related literature, focusing on the importance of ballot positioning in election turnouts), with David Brockington, *A Low Information Theory of Ballot Position Effect*, 25 POL. BEHAV. 1, 1 (2003) (concludes the more information voters have, the less of a role ballot positioning plays).

<sup>183</sup> See Part III.B.3 *supra*.



put-producing institutions. While devolution need not necessarily produce divergence, intra-jurisdictional variance is typically found within a variety of important policy domains. In particular, as demonstrated herein, there is an extreme lack of uniformity in the rules governing state constitutional modification. Observing this divergence, it is tempting to assume devolution causes many jurisdictions to feature sub-optimal rules. However, federalism also presents an opportunity, which, if exploited, could yield a more efficient institutional form than would have resulted in the absence of state control.<sup>184</sup>

Permitting devolution and exploration by multiple diverse sub-units is federalism's promise.<sup>185</sup> Heterogeneous explorers bring unique perspectives to the policy making process.<sup>186</sup> These variant perspectives can lead to innovative practices through experimentation.<sup>187</sup> In other words, through search, devolution can lead to higher levels of total utility than might have been achieved without the commitment to federalism.<sup>188</sup> The key to capturing the benefits of federalism is optimal convergence. Namely, following the search and discovery of a best practice by one jurisdiction, it is critical that other jurisdictions using a less successful policy change their process to mimic their neighbor.

It is to this reform-minded end that this article is committed. Aimed primarily at the Direct Constitutional Initiative, but with lessons for other processes, it has identified a set of existing practices that if converged upon could produce a more reasoned and more efficient process of institutional change. Since judicial officials seem unwilling or unable to serve as the referees of constitutional direct democracy, this task of policing largely falls elsewhere. Reformers, progressive or otherwise, should strongly consider the proposals advocated herein. Taken together, they would yield a process of institutional reform that respects state constitutions and treats them as the supreme level of American state law.

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<sup>184</sup> See, e.g., BEDNAR, *supra* note 18; Ken Kollman, John H. Miller & Scott E. Page, *Decentralization and the Search for Policy Solutions*, 16 J.L. ECON. & ORG. 102 (2000).

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*; see also SCOTT PAGE, *THE DIFFERENCE* (2007) (outlining the conditions under which a set of heterogeneous individuals can outperform homogeneous problem solvers; these lessons are potentially applicable to a variety of institutional forms including governments organized under a hierarchy of federalism).

<sup>187</sup> Of course, innovative practices do not always result. Despite the possibility that experimentation will lead to inefficient practices being selected, the aggregate institution could still operate quite efficiently. Federal systems need to both exploit the gains from discovered best practices while still allowing some jurisdictions to search for new innovative policy solutions. For a detailed elaboration of these ideas, see generally BEDNAR, *supra* note 18. See also March, *supra* note 2 (arguing why complete convergence is not ideal).

<sup>188</sup> See Kollman, Miller & Page, *supra* note 184.